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Supreme Court, U.S.
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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL J. O'CALLAGHAN, *Pro Se*
and
ALISON E. CLAPP O'CALLAGHAN, *Pro Se*,
Petitioners

v.

HOMAYOUN SHIRAZI, M.D., *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNTED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Does not reliance upon an invalid *Rooker-Feldman* defense and prejudicial statements so as to stop a timely, well-plead Federal diversity and civil rights case -- as well as prejudice all State proceedings -- provide grounds for a meritorious challenge upon void judgment?

2. Does not the State's allowance for tacit elder abuse and other misconduct by local patronage defendants including a church, minister and attorneys so as tortiously to transfer upon fraud/ undue influence an inheritance to themselves and "friends" violate due process and other Constitutional rights?

3. Does not the State's acceptance and misuse of "evidence" from an unlicensed/ unregistered "physician" and the State's imposed impossibility of remedy violate due process and equal protection?

PARTIES

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

DANIEL J. O'CALLAGHAN, *Pro Se*, and
ALISON E. CLAPP O'CALLAGHAN, *Pro Se*,
Petitioners

v.

HOMAYOUN SHIRAZI, M.D., *individually and in his past or present official capacity as "Physician" appointed by the Probate and Family Court Department, Trial Court, Commonwealth of Massachusetts*; HON. SEAN M. DUNPHY, *individually and in his past or present official capacity as Chief Justice of the Probate and Family Court Department, Trial Court , Commonwealth of Massachusetts*; HON. DAVID G. SACKS, *individually and in his past or present official capacity as Justice of the Probate and Family Court Department, Trial Court, Commonwealth of Massachusetts*; HON. GAIL L. PERLMAN, *individually and in her pastor present official capacities as Guardian ad Litem and/ or as Justice of the Probate and Family Court Department, Trial Court, Commonwealth of Massachusetts*; MARY LYNN CARROLL, ESQ., *individually and in her past or present official capacity as "First Assistant Register", Probate and Family Court Department, Trial Court, Commonwealth of Massachusetts*; BULKLEY, RICHARDSON AND GELINAS, LLP; REVEREND PETER B. IVES; THE FIRST CHURCHES OF NORTHAMPTON; CORASH, ZURN & BELSKY, LLP, *and Successors, if any*; and SUSAN C. SCHRODER,

Respondents.

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In The

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DANIEL J. O'CALLAGHAN, *Pro Se*
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Petitioners,

v.

HOMAYOUN SHIRAZI, M.D.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The order of the United States District Court for the District of Massachusetts which granted Defendants' motion to dismiss is not officially reported, is dated December 22, 1999, and appears in Appendix ("**App**") A at 1a. The opinion of the District Court is not officially reported, is dated December 22, 1999, and appears in App B at 2a.. The order of the District Court which directed a *$10,000 bond upon appeal* is not officially reported, is dated February 9, 2000, and appears in App C at 4a. The order of the District Court which denied R. 60 (b) relief is not officially reported, is dated December 29, 2005, and appears in App C at 4a.

The opinion and judgment of the Court of Appeals for the First Circuit which affirmed is not officially reported, is dated May 3, 2000, and appears in App D at 5a. The opinion and judgment of the Court of Appeals for the First Circuit

which affirmed the denial of R. 60 (b) relief are not officially reported, are dated November 8, 2006, and appear in App E at 10a. The decision upon sur petition for rehearing of the Court of Appeals for the First Circuit which denied the petition for rehearing en banc is not officially reported, is dated February 5, 2007, and appears at App F at 15a.

JURISDICTION

The order of the District Court which dismissed the complaint was entered on December 22, 1999. The order which denied R. 60 (b) relief was entered on December 29, 2005. Subject matter jurisdiction in the District Court was grounded upon 28 U.S.C. § 1331 and § 1332. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY AND RULE PROVISIONS

Provisions involved: 42 U.S.C. § 1983 and 1985 (3) and Federal Rules of Civil Procedure ("FRCP") Rules 12 (b) and 60 (b) and Massachusetts statutes M.G.L.A., C. 112, *Professions and Occupations* § 6 and Uniform Probate Court Practices XXII, the "*Medical Certificate Statute*".

STATEMENT OF THE CASE

The pleadings allege civil rights violations (and fraud/ undue influence upon diversity) relating to a multi-million dollar dispute in which an influential Northampton church ("**First Churches**") and minister ("**Rev. Ives**") and their counsel ("**Corash**") with the assistance of a caregiver ("**Schroder**"), her mother ("**Brandt**"), and other defendants, including an influential Springfield law firm ("**BR&G**") obstructed and precluded lawful "guardianship proceedings" concerning a 91-year-old, *in extremis*, proposed ward ("**Hortense**") a Northampton resident and close relative of Co-Petitioner. These pleadings sought declaratory and compensatory relief in consequence of: (i) bias which permeates a State probate proceeding commenced in March,

1998, (ii) conceded criminality in the proceeding including the absence of a State medical license issued to the probate court-appointed "medical doctor" ("**Dr. Shirazi**") who nonetheless has appeared in State proceedings under a false and/ or assumed name and/ or under other prohibited conduct.[1]

The Amended Complaint alleges:

- replacement of Hortense's 40-year attorney ("**Bowen**"), with the Rev. Ives'/ First Churches' attorney, Corash, in consequence of Bowen's early 1998 objection to Schroder's demand for an $85,000 gift characterized as a "loan", then, immediately upon mid-March, 1998, guardianship petition filing, retention of BR&G by Corash -- not Hortense;[2]

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[1] *Professions and Occupations*, M.G.L.A., C. 112, in part provides:

> **§6. Penalties** ... [W]hoever, not being lawfully authorized to practice medicine within the commonwealth and registered under Section two,..., holds himself out as a practitioner of medicine or practices or attempts to practice medicine ..., or whoever practices medicine under a false or assumed name or under a name other than that by which he is registered, ... or whoever files an application under a false or assumed name or under a name other than his own, ..., shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment for not less than one month nor more than one year, or both. .... (Emphasis added.)

In 1999, review of the *Massachusetts Board of Registration in Medicine* Physician Profile System did not produce any medical license issued to a "*Homayoun Shirazi*".

[2] Upon Hortense's isolation by Schroder/ Brandt and "new counsel" Corash's demand for "*all files*", at Bowen's request, Petitioners retained previously unknown Northampton attorneys ("**E&S**"). These attorneys – not Petitioners – selected Dr. Fleitman and obtained his assistance for the medical certificate required in support of guardianship petition. Thereafter, Dr. Fleitman advised E&S that Schroder aborted the examination which never was resumed/ completed. Thereupon, Corash – not Hortense -- retained BR&G. These facts remain unmentioned by the State judiciary.

- contemporaneously, the individual Respondents aborted the medical/ competency examination of Hortense by her State-licensed, long-term, well-respected family physician ("**Dr. Fleitman**") who had diagnosed Alzheimer's disease and dementia[3]; days later, these Respondents secreted Hortense's dire physical and mental condition at the critical first probate court "hearing" in early April, 1998;[4]

- thereupon, these Respondents facilitated (i) direction for a "new" medical examination absent review of records by the State-unlicensed "*Dr. Shirazi*", *i.e.*, 1000 pages in last 10 years compiled by local hospitals/physicians -- notably absent mention of any minister/ church, however, which records include regular favorable reference to Co-Petitioner -- and (ii) the appointment as guardian *ad litem* of the imminent "new" probate judge ("**Judge Perlman**") selected not from "roster/ list" but rather upon the *First Assistant Register*'s "admiration";

- the existence of secreted, multiple conflicts-of-interest concerning several Northampton/ Springfield judges and other Respondents, *e.g.*, the Chief Probate Judge/ former Mayor of Northampton ("**Chief Judge Dunphy**"), sponsor of the guardian *ad litem* as probate judge in Northampton, and another, the

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[3] The Clapp family has been in Northampton for over 350 years. Co-Petitioner and sister had maintained lifelong loving relationships with Hortense, indeed, closest relatives – to/until Bowen's revelation of Schroder's demand for an $85,000 gift and Bowen's reasonable objection. The sisters were born and educated through college in the Springfield/ Northampton community as were their parents and grandparents (Smith, Amherst and Mount Holyoke Colleges).

[4] At the First Assistant's intervention, and absent all notice to Petitioners, this proceeding occurred on *Good Friday*. Rev. Ives, BR&G, and Corash were instructed to attend with Corash representing Hortense's medical condition: "*I just saw her this morning. She's fine.*"

guardian *ad litem* who in May, 1998 -- immediately prior to announcement of appointment as probate judge – grounded upon "*Dr. Shirazi's*" "letter", recommended against guardianship, then, unnecessarily positioned as *de facto* guardian the influential Northampton minister and church, Rev. Ives/ First Churches, sponsored Schroder's continuation of 24-hour/ day dominion and control including unsupervised drug administration, and acknowledged BR&G/ Corash as Hortense's counsel;[5]

- absent review of all medical records, absent interview of anyone else, upon a perfunctory "*examination*" taken in/ about mid-April, 1998, "*Dr. Shirazi*" submitted an unsworn 1½ page defamatory "letter", inexplicably filed mid-June 1998, which recommended against guardianship;[6]

- upon discovery that BR&G and Corash had replaced Dr. Fleitman with "Dr. Zesiger", in March, 1999, Petitioners (i) obtained Dr. Zesiger's testimony which revealed that "*Mentation: markedly decreased memory ....*" "*... very high risk of grave bodily harm from falls ... ... certainly be in a nursing home if it were not for her 24-hour a day care*", *i.e.*, a "*change in circumstance*" for which a further medical examination was required so as to comply with the *Medical*

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[5] In a lengthy and unnecessary (unsigned) "Report", implausibly, Judge Perlman excused Rev. Ives' admission that "*Hortense doesn't have a clue*" as well as excused Schroder's demand for an $85,000 "gift", then, interviewed and used Schroder-selected "friends", *i.e.*, persons otherwise uninvolved in Hortense's life so as to support Rev. Ives'/ First Churches' *de facto* "guardian" status.

[6] Six (6) months later, "*Dr. Shirazi*" admitted that his *examination* was "*incomplete*" and "*unusual*", *i.e.*, recanted recommendation against guardianship. None of this is mentioned by any State court at any time.

Certificate Statute,[7] and (ii) filed an amended petition which sought examination by a well-credentialed State-licensed geriatric psychiatrist/ neurologist and Assistant Professor of Psychiatry at Brown University ("**Dr. K**");

- at a June 1, 1999, truncated/ aborted "trial session"(Springfield), Judge Perlman admitted knowledge and availability of all 1000 pages of medical records demonstrative of "*incompetence*"/ "*dependent personality*" and short life expectancy, nonetheless, reviewed none;

- at the "trial session" Hon. David G. Sacks ("Judge Sacks") – especially selected by Chief Judge Dunphy in October, 1998 -- and who had been immediate predecessor as probate judge in Northampton to Judge Perlman and who as "visiting" judge in April, 1998, had appointed Judge Perlman as guardian *ad litem* -- admitted evidence tainted with criminality and attempted to facilitate the introduction into evidence of additional criminality by "*Dr. Shirazi*", all in opposition to Petitioners' guardianship *Petition(s)*;

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[7] *Uniform Probate Court Practices XXII. Physician's Certificate (Guardian-Conservator)* , *i.e.*, the "*Medical Certificate Statute*", provides:

> *A physician's certificate, when accepted, must be dated and the examination must have taken place within thirty (30) days prior to the entry of each decree, temporary or permanent.*

As explained by Chief Judge Dunphy – although such well-known Treatise, consistently omitted by all State courts:

> "**The medical certificate and the examination must have taken place within thirty days** prior to the entry of each decree ... Therefore, it may be necessary to obtain and file several medical certificates in the course of a guardianship proceeding. *Massachusetts Probate Practice and Procedure*, Second Edition, S. Dunphy, at 224, 227 -228. (Emphasis added.)

- at the "trial session" evidence established that Rev. Ives/ First Churches were well-known/respected by the guardian *ad litem*, a "*co-convenor*" at public gatherings in First Churches with Rev. Ives just imminent to guardian *ad litem*/ judicial appointment and that said minister/ church had as their long-term attorney, Corash, a 20-year Northampton colleague of Judge Perlman and that "*Dr. Shirazi*" had been Judge Perlman's colleague on cases as a former employer; also, established that "*Dr. Shirazi*" was well-known to Judge Perlman's husband, a Northampton psychiatrist;

- at the "trial session", <u>again</u>, Petitioners presented Dr. Zesiger's "*change in circumstance*" evidence as well as additional medical evidence (App. __), but Judge Sacks declined to grant a stay/ continuance so as to accomplish the *Medical Certificate Statute*-mandated medical examination upon amended petition as supported by Dr. Zesiger's records;

- at the "trial session" – originally scheduled by Judge Sacks for 3 days -- the <u>only witness to testify was Judge Perlman;</u> then, Judge Sacks presented a consent ***Proposal***, *i.e.*, that "*Dr. Shirazi*" and Dr. Fleitman (but <u>not</u> "Dr. K") reexamine Hortense the following day at her Northampton home with Judge Sacks in attendance and thereafter that "*Dr. Shirazi*" and Dr. Fleitman return to Springfield in order to testify during the 2 remaining days of the 3-day scheduled trial;

- Petitioners arranged for Dr. Fleitman's review of 1000 pages of medical records in preparation for the proposed 2nd day reexamination and Dr. Fleitman agreed to conduct the reexamination and Petitioners so advised Judge Sacks;

- thereupon, <u>BR&G</u> presented to Judge Sacks "*Dr. Shirazi*" who declined to conduct any reexamination; then, Judge Sacks directed (more, "threatened") "*Dr.*

Shirazi" to consult with counsel so as to obtain approval for the reexamination;

- 1 ½ hours later, "*Dr. Shiraii*"'s private counsel arrived but declined to provide identity until upon Petitioners' request; immediately, said counsel directed "*Dr. Shirazi*" not to conduct any further medical examination and "*Dr. Shirazi*" refused to reexamine;
- thereupon, absent any further evidence/ rulings – including Dr. Fleitman's reexamination and testimony scheduled for the following day -- Judge Sacks aborted the trial and immediately departed the bench;
- later, Judge Sacks (and the *First Assistant Register*) issued "*Findings and Conclusions*" – all of which omitted any of these events and omitted Dr. Zesiger's existence and Dr. Zesiger's evidence of medical "*change in circumstance*"; and
- said pleading further itemized pervasive due process/ equal protection violations, right of access violations, and compelling evidence of fraud/undue influence/attorney-client abuses. *e.g.*, Dr. Zesiger's existence/ records never mentioned by State courts.

Thereafter, 7 days subsequent to Amended Complaint filing, Judge Sacks entered a *Decree of Dismissal* of the March, 1998, guardianship petition – one irrelevant pursuant to the *Medical Certificate Statute* -- grounded upon "*failure to meet burden*". Such "burden" was made impossible by the State as Dr. Fleitman's medical evidence was barred by the *Medical Certificate Statute* as stale (more than 30 days old) and a new medical examination grounded upon Dr. Zesiger's "*change in circumstance*" medical records prevented/ unaccomplished. At such time, *i.e.*, 1 year subsequent to a BR&G secreted, unduly influenced "*new will*", Petitioners were absent knowledge and were prevented by the State

Respondents – and regrettably, the district court – from obtaining knowledge relating to "*new will*". However, in the Complaint/Amended Complaint/ Supplemental Complaint, Petitioners had identified the purpose and consequences of these unfair events: "... *fraudulent scheme ...[tortuous transfer of Hortense's assets] to Defendants... preclusion of evidence relating to a full and fair will contest ...*"

In the Federal action, grounded upon Dr. Zesiger's testimony/ records – whose existence, records and letters BR&G had secreted for a year – and Rev. Ives'/ First Churches' "*custody and control*", on August 6, 1999, Petitioners sought R. 35 relief grounded upon evidence of *in extremis* medical condition and substantial likelihood for Hortense's demise prior to resolution of probate appeal proceedings -- as occurred three (3) years later.[8] The district court denied the application. Notwithstanding Petitioners' objections grounded upon potential for evidence destruction/ alteration, the district court concurrently directed a stay of all discovery. On September 20, 1999, Petitioners presented an R. 15/ R. 65 motion. The district court did not set a date for hearing, nor rule upon the motion including Supplemental Complaint. Rather, on December 22, 1999, the district court directed the Clerk to "*dismiss the case in its entirety*". Thereafter, the district court by order dated February 8, 2000, prejudicially stated that an appeal upon well-known Federal precedents and well-documented facts would be identified by the Circuit Court as "... *appearing frivolous*". Additionally, the district court directed the posting by Petitioners of a "*bond ... $10,000, on or before 12 noon 2/25/00*".

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[8] In contradiction to State law, Rev. Ives purportedly obtained a *Power of Attorney* from Hortense in July, 1998, *i.e.*, mid-guardianship proceeding, witnessed by Schroder and her mother Brandt – a recent member of Rev. Ives' church -- and notarized by Corash. Earlier, in July, 1997, Rev. Ives purportedly had obtained a *Healthcare Proxy*, likewise facilitated and witnessed by the same persons.

State post-deprivation "remedies" remained meaningless, *e.g.*, (State) Appeals Court November 2, 1999, "denial" of Petitioners' motion for: (i) expedited appeal in context of *in extremis* proposed ward, (ii) restraint upon Rev. Ives/ First Churches/ Schroder and (iii) direction for prompt production of Hortense for actual medical examination. However, the (State) Appeals Court summarily denied multiple Petitioners' applications – at least 10 over 6 years -- for any relief including requests grounded upon exigency of medical condition and prejudicial 3-year "appeal" concerning a 92-95-year-old infirm, isolated woman resulting in inevitable "mootness" upon (eventual) August 7, 2002, demise that: (i) the guardianship proceeding be transferred to a neutral forum and (ii) a State-licensed geriatric psychiatrist with full access to comprehensive medical records conduct a "real" examination – notably, in context of the *Medical Certificate Statute* which necessitates such examination 30 days prior to *Decree* (*see* Chronology).[9]

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[9] Guardianship petition 3.16.98

Dr. Zesiger replaces Dr. Fleitman 4.6.98

GAL report 5.28.98

Will change: "*new will*" 6.15.98

Amended petition 3.22.99

Federal Complaint **4.29.99**

Trial session 6.1.99

Amended Federal Complaint **6.23.99**

Decree of dismissal & findings 7.1.99

"New" amended petition 8.4.99

Notice of appeal (State) 8.25.99

State appeal court denial 6.18.02

Date/ death 8.7.02

Hortense's (and Clapp family's) prior counsel for 40 years, Bowen – replaced on the eve of guardianship proceedings by Corash/ BR&G absent all evidence for legitimacy – had maintained a will which had provided sole inheritance for at least 20 years to Co-Petitioner and her sister. However, upon commencement of guardianship proceeding, loving relatives were locked out of Hortense's life by Schroder, Brandt, Rev. Ives/ First Churches, BR&G, Judge Perlman and through a State-appointed physician, "*Dr. Shirazi*" -- who lacked medical record and medical license.[10]

Unquestionably, Hortense remained a dependent personality susceptible to undue influence by Schroder, Brandt and Rev. Ives/ First Churches. These persons were provided by Judge Perlman and "*Dr. Shirazi*" with opportunity for years secretly to exercise undue influence. In consequence, subsequent to at least a 20-year will which had identified Co-Petitioner and her sister as sole heirs, suddenly, within weeks, Hortense's 40-year attorney was replaced by "new counsel" BR&G as retained by Corash (through Schroder).[11] Likewise, the many-year family physician Dr. Fleitman was replaced within weeks by Dr. Zesiger through BR&G (secretly for a

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[10] *Immunity Defenses Unavailable*: Such defenses do not support dismissal of the Federal pleadings. *See generally*, *Elder v. Holloway*, 510 U.S. 510 (1994); *Rivera-Ramos v. Roman*, 156 F.3d 276, 279 (1st Cir. 1998). "Dr. Shirazi" -- an individual conceded by Respondent *First Assistant* as having for many years and in "*dozens if not hundreds of cases*", typically anti-psychotic medications, engaged apparently in criminal conduct -- may not be provided immunity.

[11] At no time was there required any evidence of such "new counsel" arrangement. Instead, at every occasion, the State courts prevented all public appearance by Hortense or impartial examination, thus, wrongfully continuing Hortense's isolation -- until demise. For example, although the PTO listed Hortense as a trial witness and BR&G listed Hortense as a trial witness, upon Petitioners' subpoena to Schroder/ Brandt for Hortense's ordered appearance at the "*trial session*", Judge Sacks refused to enforce the PTO or subpoena.

year), all so as to position inheritance to Rev. Ives/ First Churches and their friends.

The chronology of this matter reveals that upon April 29, 1999, Federal commencement, this Federal case was "stopped". Hortense reached her 92nd year in dire medical condition and remained under the influence/control of Respondents. Throughout, the (State) Appeals Court's evidenced disinterest in any timely appeal or any remedy upon any of Petitioners' applications and eventual 3-year "appeal" - one concluded just 6 weeks prior to Hortense's demise.[12]

On September 4, 2002, Corash wrote to advise of Hortense's demise and commencement of probate proceedings upon a purported "*new will*" dated June 15, 1998, which had excluded Petitioners and sister. This "*new will*" was purported to have been made 4 years earlier, *i.e.*, within 2 weeks of Judge Perlman's "report" which had positioned Rev. Ives/ First Churches as *de facto* guardian. Timely, Petitioners (and sister) filed objections. Corash and (new) counsel for Hortense's estate ("**Newman**") moved to strike with stated reliance upon the underlying "guardianship proceeding" and Federal proceeding. Corash/ Newman's submissions were identical to BR&G's many-year prejudicial submissions to the (State) Appeals Court and Supreme Judicial Court, *i.e.*, all included express reliance/production of Federal docket, orders/judgments, including district court's and Circuit Court's *Rooker-Feldman* dismissals and prejudicial "*$10,000 bond*" and "*appeal appearing frivolous*" statement(s).

On March 19, 2003, the probate court ("**Judge Wilson**") granted Corash/ Newman's motion to strike objections. As requested by Corash/ Newman, the grounds

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[12] In this manner, the State appellate courts unfairly precluded Supreme Court review of the guardianship proceeding upon *certiorari*. *See Florida v. Thomas*, 532 U.S. 774 (2001).

identified by Judge Wilson included reliance upon the prior "guardianship proceeding" and the dismissed Federal district court and Circuit Court proceedings upon *Rooker-Feldman*. Judge Wilson entered a *Decree* dated March 26, 2003, for the probate of "*new will*" with Rev. Ives as "executor". Petitioners (and sister) timely filed a *notice of appeal* dated April 15, 2003. Corash/Newman filed another *motion to strike*, this one against the *notice of appeal* -- again in reliance upon the *Rooker-Feldman* dismissals, *$10,000 bond* and "*frivolous appeal*" prejudice and again which included Federal docket sheets and *Rooker-Feldman* dismissal orders/ judgments. Again, Petitioners timely filed opposition. Thereafter, Judge Wilson did not address these submissions, rather, secretly concluded proceedings.

On October 26, 2005, Petitioners sought R. 60 (b) relief upon recent Supreme Court statements relating to *Rooker-Feldman* and the long-evidenced Dr. Zesiger medical "*change in circumstance*" which BR&G had secreted and the State Respondents omitted from mention or notation. Respondents filed opposition in which there was revealed that although the (probate) *Register* timely had docketed Petitioners' *notice of appeal*, nonetheless in violation of State law, the probate "will contest" record was not transferred to the (State) Appeals Court. Instead, the (probate) *Register*, Judge Wilson, Rev. Ives/Corash/Newman secretly concluded the proceeding absent any/ all consideration of Petitioners' timely filed/ docketed *notice of appeal*.

Undoubtedly, everyone in this dispute except Petitioners was well aware that upon Hortense's immediate isolation for years -- until demise, then Judge Perlman's unusual and special intervention, Hortense's will secretly within days had been re-written by BR&G to designate Rev. Ives/ First Churches, Schroder and Brandt as replacement beneficiaries as well as their assistants in an unfair, positioned guardianship proceeding so as to pre-position a pre-determined multi-million dollar inheritance to themselves and

friends. Petitioners seek Federal remedies as meritoriously and timely requested in April, 1999.

Reasons for Granting the Writ

Respectfully, Petitioners submit that the statement "*appeal appearing frivolous*" and requirement for *$10,000 bond* were not for a proper purpose nor grounded upon established precedents, rather, unfairly issued so as to prejudice Petitioners' meritorious Federal appeal as well as to promote – as happened -- similar prejudice throughout the State judicial system, including through fraud and undue influence a pre-positioned inheritance to individual Respondents and friends. Many years of delay upon an escalator of pre-judged motions, useless applications and tedious appeals demonstrates the existence of an unfair/inadequate post-deprivation remedy within the State system This is not a case involving long-lived corporations or other entities, rather, upon April, 1999, Federal commencement, involved a frail/ failing nearly 92-year old woman – a loved one of the Petitioners, nonetheless, who for 6 years until demise relentlessly and irrationally was denied by the State any medical examination by a licensed physician in any timely manner pursuant to the *Medical Certificate Statute*.

***Rooker-Feldman* Not a Bar.** The district court and Circuit Court have relied expressly upon *Rooker -Feldman* to bar all remedies/relief to Petitioners. This Court in *Exxon Mobil Corporation v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), identified the always limited application of *Rooker-Feldman*. Respectfully, this identification is/ remains exactly in the same manner and to the same effect as Petitioners have presented to the district court and Circuit Court since 1999. In compliance with *Exxon-Mobil*, Petitioners' pleadings should not have been dismissed nor prejudiced. Here, a *Rooker-Feldman* bar does not exist – and has not ever existed. A jury may determine that Petitioners' civil rights were violated and may establish appropriate declaratory and compensatory relief

for the value of such loss and injury. Similarly, a jury may address Petitioners' diversity claims for the value of a fraudulently transferred multi-million dollar inheritance. Here, *Exxon Mobil* does not establish a "*new principle of law*", does not "*overrul[e] clear past precedent*" and does not "*decide[e] an issue of first impression*". Here, *Rooker-Feldman* is not a mere "rule", rather, an extraordinary and selective limitation upon Article III jurisdiction. Regrettably, the district court and Circuit Court applied *Rooker-Feldman* contrary to the plain meaning of those underlying cases -- *Rooker* and *Feldman – i.e.*, applied correctly only upon a prior final State court judgment.

The Circuit Court's decision in *Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R.*, 410 F. 3rd 17 (1st Cir. 2005) supported R. 60 (b) relief from erroneous earlier *Rooker-Feldman* bar. As stated in *Federacion*, 410 F. 3rd at 27:

> *Exxon Mobil tells us when a State court judgment is sufficiently final for operation of the Rooker-Feldman doctrine: when "the state proceedings [have] ended." 125 S. Ct. at 1526. If federal litigation is initiated before state proceedings have ended, then ...the litigation is parallel, and the Rooker-Feldman doctrine does not deprive the court of jurisdiction. See i.d. at 1526-28. On the other hand, if federal litigation is initiated after state proceedings have ended, and the plaintiff implicitly or explicitly "seek[s] review and rejection of [the state] judgment," i.d. at 1526, then, a federal suit seeking an opposite result is an impermissible attempt to appeal the state judgment to the lower federal courts, and, under Rooker-Feldman, the federal courts lack jurisdiction.*

Here, the federal litigation was initiated before the state proceeding had ended. Here, *Rooker-Feldman* never applied to bar the district court from jurisdiction. Here, the

district court's assertion of "*frivolous appeal*" and imposition of *$10,000 bond* payable within weeks irrevocably injured Petitioners' rights and remedies in the State proceeding.[13]

A motion for relief from void judgment may be made at any time. *See Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3rd 1126, 1130 (11th Cir. 1994). Relief may be granted where the court acted in some manner inconsistent with Constitutional due process. *See United States v. Boch Oldsmobile, Inc.*, 909 F. 2nd 657, 661, *et seq.* (1st Cir. 1990). Here, all due process and other Constitutional protections were denied to Petitioners upon a many-year improperly applied *Rooker-Feldman* bar. Here, a substantial restatement of long extant law occurred since the contested orders/ judgment were entered. Indeed, the Circuit Court's decision in *Federacion de Maestros* -- omitted in the Circuit Court's *per curiam Opinion* (App. E) -- supports R. 60 (b) relief from erroneous earlier *Rooker-Feldman* bar.[14]

Other Relief Meritorious. Federal jurisdiction exists upon claims arising out of purported wills. *Markham v. Allen*, 326

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[13] Notably, the Circuit Court in *Umsted v. Umsted*, 05-1484 (April 14, 2006) identified legitimacy to Petitioners' tortious interference with inheritance upon fraud/ undue influence claims.

[14] Compliance with the existing orders/ judgments continues to impose extreme hardship. *See United States v. Kayser-Roth Corp.*, 272 F. 3rd 89, 95 (1st Cir. 2001)..

Contemporaneous with the Circuit Court's consideration of an earlier appeal and issuance of first *per curiam* decision (May 3, 2000), the Circuit Court reviewed *Mangieri v. Mangieri*, and on September 11, 2000, issued a decision reported at 226 F. 3rd 1 (1st Cir. 2000). However, neither the district court nor the Circuit Court imposed a "bond", indeed, a $10,000 bond to be deposited within days by a *pro se* husband and wife in a dispute concerning an unlicensed "physician" and local patronage defendants. Regrettably, here, the district court's exceptional requirement for *$10,000 bond* with declared "*frivolous appeal*" entirely prejudiced Petitioners' rights and remedies in the State court system for years -- which continues.

U.S. 490 (1946). Recently, in *Marshall v. Marshall*, __ U.S. __, 04-1544 (2006), respectfully, this Court validated the legal grounds asserted by Petitioners particularly in context of *Markham* standards.[15] Also, in *Marshall* the so-called "*probate exception*" was addressed and the Circuit Court's application in *Mangieri v. Mangieri*, 226 F. 3rd 1 (1st Cir. 2000) determined improper.[16] Regrettably, the record in this case for years establishes that the State treated differently this guardianship and eventual will proceeding from any other reported proceeding. Unfairly there was barred all remedy, all revelation of medical condition, all revelation of the "caretaker's" aborting of medical examination by the many-year qualified family physician, all revelation of judicial association in the Northampton/ Springfield community, all revelation of medical deposition testimony which established "*change in circumstance*" and all evidence of failure to provide State due process for medical examination upon such "*change in circumstance*".

Instead, Corash and BR&G, attorneys previously entirely unknown to the proposed ward were positioned unfairly to control for years the proposed ward through "in-house" "caretaker(s)". At no time was there any restraint placed upon Schroder's/ Brandt's relationship with Rev. Ives, Corash and/ or BR&G. These unusual facts and circumstances occurred through the influence of Judge Perlman as "*guardian ad litem*", a role demanded by Rev. Ives, Corash and BR&G and accomplished immediately, *i.e.*, days prior to announcement of Judge Perlman's appointment

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[15] In a *Marshall* concurrence, __ U.S. __, Justice Stevens stated:

> *Rather than preserving whatever vitality that the [probate] "exception" has retained ..., I would provide the creature with a decent burial in a grave adjacent to the resting place of the Rooker-Feldman doctrine.*

[16] As in *Mangieri*, likewise in *Umsted, i.e.*, no prejudicial *$10,000 bond* payable in 2 weeks and no "*frivolous appeal*" characterizations.

as next probate judge in Northampton.

Due Process/ Equal Protection Claims Valid. Petitioners present due process and equal protection claims[17]. The Circuit Court has identified allowance for § 1983 relief against a state official who selectively enforces a law out of malice/bad faith intent to injure the exercise of a constitutional right. *See Rubinovitz v. Rogato*, 60 F. 3d 906 (1st Cir. 1995)[18]. Upon many applications to the district and circuit courts, Petitioners sought elemental due process, *i.e.*, a medical examination of a proposed ward in a guardianship proceeding. Relentlessly, the State courts denied such right. Regrettably, the district and circuit courts failed to direct such examination. In retrospect, obviously, a timely examination by an independent, qualified expert such as Dr. K promptly would have revealed the proposed ward's incompetence, the presence of undue influence and fraud and that Hortense's will and inheritance directions tortiously had been changed -- after 20 years – to benefit Rev. Ives/ First Churches, Schroder, Brandt, and "friends", as well as position Rev. Ives as executor and provide financial benefit to Corash and BR&G.

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[17] *See generally, Ryland v. Shapiro, supra*, 708 F. 2d 967, 972-973 (5th Cir. 1983): *"..[C]laim... deprived of property without due process. The Supreme Court has long held that '[t]he hallmark of property.. is an individual entitlement grounded in state law, which cannot be removed except "for cause" '"*

See also, In Re Cincinnati Radiation Litigation, 874 F. Supp. 796, 824-825 (S.D. Ohio 1995): *"....[T]he ... Supreme Court has recognized that a cause of action is a species of property protected by the ... Due Process Clause .... [A]ny state action that substantially interferes ... violates procedural due process ..."*

[18] Not only do Petitioners allege deprivation of a constitutionally protected property interest, *i.e.*, a *cause of action*, but also allege that the procedures under State law relevant to guardianship are constitutionally inadequate. Accordingly, *Watterson v. Page*, 987 F. 2d 1, 7 (1st Cir. 1993) supports Petitioners' claims.

Injunctive and Declaratory Relief Standards Met. Judge Sacks' denial of medical examination by any licensed physician within *Medical Certificate Statute* requirements presented legal inability for Petitioners to demonstrate "incompetence". Here, there occurred a violation of Petitioners' (i) substantive right of access to courts, and (ii) equal protection/ due process rights.[19] The June 1, 1999, "trial session" solely upon "competency" -- nonetheless probate court ordered absence of ability to provide compliance with the *Medical Certificate Statute* -- presented not only (i) the absence of adequate remedy at law, but also (ii) certain, irreparable injury; *viz.*, statutory inability to "prove" incompetency. Here, through denial of medical examination and direction for bifurcated trial solely upon "competency", *i.e.*, not guardianship, Judge Sacks (and Judge Dunphy) facilitated the occurrence of a June 1, 1999, "trial session" in which all opportunity for remedy was precluded to Petitioners by State law.

No Abstention Bar. As identified in *Friends of Children Inc. v. Matava*, 766 F. 2d 35, 36 (1st Cir. 1985), abstention is inappropriate upon a claim for unusual harm where State remedial processes are inadequate. Here, Petitioners became entrapped in a Northampton forum replete with secreted and entrenched conflicts of interest. There occurred the consistent

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[19] *See also, In Re Jordan*, 290 OR 669, 624 P.2d 1074 (1981) (close personal association in small community provides grounds for disqualification). The State's "*Judicial Questionnaires*" include subjects relating to a candidate's "*business, civic and community involvement ...*" including "*inquiries of colleagues, judges and others ...*".

The district court barred all discovery, most importantly, any medical examination of the proposed ward at any time. Also, the district court denied Petitioners' request for production of "*Judicial Questionnaires*". These documents itemize by name, address, and status the sponsors for judgeship of candidates for such office. Petitioners contended that such production was/ remains essential.

denial of any ability to have any "*day in court*".[20] The record evidences a State agenda to deny Petitioners' any due process. This occurred so as fraudulently to position a "will contest" through unconstitutional mis(use) of a guardianship proceeding. Throughout, a timely medical examination, the one event essential to a fair proceeding and absolutely required by State law, *viz.*, the *Medical Certificate Statute*, relentlessly was denied to Petitioners absent rational reason.[21] Here, also, a full and fair medical examination by an impartial, qualified physician with proper procedures and access to medical records relentlessly was denied. Instead, Petitioners were compelled to attend a show "trial" absent all due process and years of pre-determined adverse consequence.

The erroneous application of *Rooker-Feldman* which stopped the Federal action discouraged State concern for Federal oversight/standards. Denial of due process upon erroneous application of such doctrine promoted the State's disinterest in exposure of unfair/collusive arrangements in the Northampton/ Springfield forum. The substantive "*vexatious appeal*" and *$10,000 bond* requirement undermined any ability of Petitioners to pursue Federal remedies in any State

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[20] These and other "*deficiencies*" are not "*... readily and adequately correctable under State law in State court*" and there exists/ remains "*... the sort of serious, imminent, and irreparable harm that conceivably might warrant extraordinary federal court intervention*", the standards identified in *Malachowski v. City of Keene*, 787 F. 2d 704, 708-709 (1st Cir. 1986)

[21] Within days of BR&G's wrongful and undue influenced change in Hortense's will – now revealed to have occurred on June 15, 1998 -- Judge Wilson on June 29, 1998, promptly (had) proposed that the will so be changed in order that BR&G could pursue counsel fees. This is exactly as BR&G pursued and exactly as BR&G (and others) have (mis)behaved throughout before both Federal and State courts.

Notably, consistent with said *Statute*, at the same early proceeding, Judge Wilson proposed a further medical examination upon a *new "petition"* as the 2 conflicting reports (Dr. Fleitman and "*Dr. Shirazi*") establish "*nothing conclusive*", now, *both out of date*. *See* Treatise, *infra*.

court(s). In continuing violation of State procedure and due process, as conceded, the (probate) *Register* failed to assemble the "will contest" record and transfer such to the (State) Appeals Court. Thus, unconscionably, the State has assured no trial and no appeal. In this Federal case, the State violated Petitioners' due process at every opportunity where a significant right was identified, *viz.*, medical evidence upon a guardianship. Later, in the "will contest", the State continued in unfair practices. Petitioners have exhausted and exhausted any and all State remedies which may have been required relating to guardianship and inheritance. *See Umsted, supra.* Petitioners have proven that State remedies/ procedures are inadequate. More, upon demise of the proposed ward, all medical evidence was made impossible. Respectfully, the well-plead grievances presented for years to a Federal forum now should proceed.

Right of Access to Courts. In *Ryland v. Shapiro*, 708 F. 2d 967 (5th Cir. 1983), the Fifth Circuit stated at 971-973:

> ***The Substantive Right of Access to Courts:*** *The right ...is basic to our system of government, ... it is one of the fundamental rights protected by the Constitution. In Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142 ... (1907), the Supreme Court ...[stated]:*
>
> *The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights . . . It is one of the ... most essential privileges of citizenship. . . .207 U.S. at 148, ... (citations omitted). . . . .*
>
> *A third constitutional basis for the right . . .the due process clause. .... A mere formal right ... does not pass constitutional muster. Courts have required that the access be "adequate, effective, and meaningful." Bounds v. Smith, 97 S.Ct. at 1495. ... Interference.. gives rise to a claim for relief under section 1983....(Emphasis added.)*

The First Circuit relied upon *Ryland* in identifying the

right in *Simmons v. Dickhaut*, 804 F. 2d 182 (1st Cir. 1986). As stated in *Crowder v. Sinyard*, 884 F. 2d 804 (5th Cir. 1989):

> *Ryland stands for the proposition that if state officials wrongfully...conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay ... substantially reduce the likelihood of ... relief ..., they may have committed a constitutional violation.* .... 884 F. 2d at 812-815.[22]

Conclusion

For these reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Dated: New York, New York
May 1, 2007

Petitioner, *Pro Se*
DANIEL J. O'CALLAGHAN

Petitioner, *Pro Se*
ALISON E. CLAPP O'CALLAGHAN

c/o Daniel J. O'Callaghan, Esq.
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(212) 222-4200

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[22] *See generally, Jones v. Clinton*, 72 F. 3d 1354, *reh. denied* 81 F. 3d 78 (8th Cir. 1998) ; *Whalen v. County of* Fulton, 126 F. 3d 400, 406-407 (2nd Cir. 1997) ("*[W]hen government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively," an unconstitutional deprivation of a cause of action occurs [citing Barrett v. United States*, 798 F. 2d 565, 575 (2nd Cir. 1986)]".

APPENDICES

APPENDIX A – ORDER OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, DECEMBER 22, 1999

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

ALISON E. CLAPP O'CALLAGHAN, *PRO SE*, AND DANIEL J. O'CALLAGHAN, *PRO SE*, Plaintiffs, v. HOMAYOUN SHIRAZI, M.D., ET AL., Defendants.	Civil Action No. 99-10914-DPW

ORDER OF DISMISSAL

WOODLOCK, District Judge

In accordance with this Court's Memorandum and Order issued December 22, 1999 allowing the several defendants' Motion to Dismiss, and Dismissing the action in its entirety, for the reasons stated therein, it is hereby ORDERED that the above-entitled action be, and it hereby is, DISMISSED in its entirety, and all other motions pending on the docket shall be terminated as moot in view of this dismissal.

BY THE COURT,

S/_____
Deputy Clerk

Dated: December 22, 1999

APPENDIX B – MEMORANDUM AND ORDER OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED DECEMBER 22, 1999

ALISON E. CLAPP O'CALLAGHAN, *PRO SE*, AND DANIEL J. O'CALLAGHAN, *PRO SE*,	:	
Plaintiffs,	:	Civil Action No. 99-10914-DPW
v.	:	
HOMAYOUN SHIRAZI, M.D., ET AL,	:	
Defendants.	:	

MEMORANDUM AND ORDER
December 22, 1999

I have reviewed the compendious, confused and confusing submissions of the plaintiffs in this action in light of the motions to dismiss filed by the multiplicity of defendants. After consideration of these materials – and particularly of the plaintiffs' most recent Supplemental Complaint, together with the assertions contained in the Petition for Writ of Mandamus filed last month in connection with this matter – I have come to the firm conviction that this action is nothing other than a collateral attack upon interlocutory orders and a final judgment in a state court guardianship proceeding. Consequently, I will direct the Clerk to dismiss this case because to do otherwise would constitute an improvident exercise of federal court jurisdiction.

The United States Court of Appeals for the First Circuit recently emphasized that the most important exception to the grant of the subject matter jurisdiction plaintiffs allege here is "that federal courts do not have jurisdiction pursuant to § 1983 to review the judgments and decisions of state courts."

Hill v. Town of Conway, 193 F.3d 33, 41 (1st Cir. 1999) (quoting Erwin Chemerinsky, *Federal Jurisdiction* 423 (2d ed. 1994). Where, as in this litigation, the plaintiffs' challenge is inextricably intertwined with the merits of state court decisions and any federal relief must be predicated on the proposition that those state court judgments and decisions were wrong, the *Rooker-Feldman* doctrine, *see generally*, *Hill*, 193 F.3d at 34-35 & n.1, bars the exercise of inferior federal court jurisdiction, because the "[l]ower federal courts are without subject matter jurisdiction to sit in direct review of state court decisions." *Wang v. New Hampshire Board of Registration in Medicine*, 55 F.3d 698, 703 (1st Cir. 1995).

Particularly where, as here, the litigation arises out of an ongoing dispute over guardianship, I would be disposed to decline the exercise of jurisdiction, even if otherwise permissible, and instead to abstain. Such abstention is in recognition not merely of the fact that the underlying proceeding preceded this litigation and the relief sought here would interfere with presumptively adequate ongoing state judicial proceedings. *See, e.g.*, *Bettencourt v. Board of Registration in Medicine*, 904 F.2d 772, 777 (1st Cir. 1990); *South Boston Allied War Veterans Council v. Zobel*, 830 F. Supp. 643, 648-49 (D. Mass. 1993). It is also in recognition of the fact that the matters at issue are in the realm of domestic relations, an area of paramount concern to core state interests which the state courts address through a carefully calibrated and coherent set of established state policies and procedures. *See generally Hemon v. Office of Public Guardian*, 878 F.2d 13 (1st Cir. 1989); *Friends of Children, Inc. v. Matava*, 766 F.2d 35 (1st Cir. 1985) (Breyer, J.)

The motions of the several defendants to dismiss this case are ALLOWED and the Clerk is directed to DISMISS the case in its entirety.

S/Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

APPENDIX C – ORDERS OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS DATED FEBRUARY 8, 2000 AND DECEMBER 29, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MATTER OF: Case: 1:99-cv-10914

Judge Douglas P. Woodlock

Clapp O'Callaghan – plaintiff

v.

Shirazi – defendant

NOTICE OF ACTION BY THE COURT

* * * * *

The following ruling was made on 2/8/00 and entered on the docket:

Judge Douglas P. Woodlock. Endorsed Order entered granting [116-1] joint motion for order requiring bond. ALLOWED, the appeal appearing frivolous, the appellants shall post a bond in the amount of $10,000 on or before 12 noon 2/25/00 pursuant to Fed.R.App.7. Notice sent to counsel. [EOD Date 2/9/00]

NOTICE OF ACTION BY THE COURT

* * * * *

Judge Douglas P. Woodlock: Electronic ORDER entered granting Motion for Leave to File but denying Motion relief from judgment and recusal, no good cause having been demonstrated either for recusal or revival of this case.

Entered 12/29/2005

APPENDIX D – OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
DATED MAY 3, 2000

[No. 00-1148, -1149, -1150, -1151, -1152, -1153, -1323]

DANIEL J. O'CALLAGHAN; ALISON E. CLAPP O'CALLAGHAN,
Plaintiffs, Appellants,
v.
HOMAYOUR SHIRAZI, M.D., ET AL.,
Defendants, Appellees.]

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Douglas P. Woodlock, *U.S. District Judge*]

Before
Torrruella, *Chief Judge*,
Selya and Stahl, *Circuit Judges.*

Daniel J. O'Callaghan and *Alison E. Clapp O'Callaghan* on brief pro se.

May 3, 2000

Per Curiam. The court is in receipt of appellant's opening briefs, and, after a thorough review of those submissions and the record on appeal, we summarily affirm the judgment in Ct. App. Nos. 00-1148 and 00-1323. *See* 1st Cir. Loc. R. 27(c).

Appellants Daniel J. O'Callaghan and Alison E. Clapp O'Callaghan ("the O'Callaghans") raised four challenges to the state guardianship proceeding in question: 1) the defendants/ appellees violated their right of access to courts and their rights to equal protection and due process; 2) the

Massachusetts Uniform Probate Court Practices XXII are unconstitutional "as applied"; 3) their "Federal rights" were violated because the probate judge relied on the report of a physician who the O'Callaghans claim was not licensed, and on the report of the guardian ad litem, who the O'Callahgans say had a conflict of interests; and 4) several of the defendants conspired together and caused the state court to violate the O'Callaghans' constitutional rights. The lower federal courts plainly lack jurisdiction to consider these claims under the *Rooker/Feldman* doctrine. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

The Supreme Court has allowed that the lower federal courts do have subject matter jurisdiction in some cases involving challenges to state court proceedings, but only where a "general challenge" to state rules or statutes are raised, so that the claim is not "inextricably intertwined" with the state court claims. *Feldman*, 460 U.S. at 486. This court has explained the distinction: "A federal claim is inextricably intertwined with the state-court claims 'if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.'" *Sheehan v. Marr*, --F.3d --, 2000 WL 298565 at *3 (1st Cir. 1999) (quoting *Hill v. Town of Conway*, 193 F.3d 33, 39 (1st Cir. 1999)). "If the decision [of the state court] was wrong, that [does] not make the judgment void, but merely [leaves] it open to reversal or modification in an appropriate and timely appellate proceeding." *Rooker*, 263 U.S. at 415. A litigant must challenge the allegedly unconstitutional action first in the state appellate courts, and then may petition the U.S. Supreme Court for a writ of certiorari.

The O'Callaghans' first and third claims clearly are barred by the *Rooker/Feldman* doctrine because they allege that certain actions in the state court proceeding by the defendants violated their constitutional rights; they do not allege that the state rules themselves were unconstitutional.

thus, the first and third claims are "inextricably intertwined" with the state court claims. The fourth claim also is barred by the *Rooker/Feldman* doctrine. It alleges in general, conclusory terms that the appellees conspired to cause the state court to reach a wrong result. As framed, it simply seems to be an indirect way of again saying that the state court's decisions were wrong.

It is not entirely clear whether the O'Callaghans' second claim raises a general constitutional challenge to state rules, but even if this court were to assume (without deciding) that it does raise a general constitutional challenge, the claim is barred. The court is unable to discern from appellants' brief in what way they claim the state rules are unconstitutional. Without a well-developed argument on this point, the issue has been waived. *See Martinez v. Colon*, 54 F.3d 980, 990 (1st Cir. 1995).

As the O'Callaghans' substantive appeal lacks merit, we likewise see no error in the district court's order requiring them to post an appeal bond; and we see no error in the district court's order denying their request to impose a similar requirement on the cross-appellants. Likewise, their challenge to the district court's denial of the motion for recusal lacks merit. Their challenge to the denial of Fed.R.Civ.P. 27(b) relief is moot.

A number of motions also are pending in these matters, and our summary affirmance moots most of those motions. The following motions are denied as moot: 1) appellants' "emergency motion" for Fed.R.App.P. 8 order granting injunction while appeal pending; for expedition of appeal process; and for retention of appendices filed March 2000; 2) appellees' motion for an order striking appellants' improper appendix and requiring filing of proper appendix; and 3) appellants' motion to consolidate to the extent it addresses appeal nos. 00-1148 and 00-1323. The motion to consolidate is allowed to the extent it addresses the cross-appeals; cases 00-1149, 00-1150, 00-1151, 00-1152 and 00-1153 shall be

consolidated. Appellants have withdrawn their motion to stay, and the court denies their motion to certify questions to the U.S. Supreme Court.

Appellants' motion to dismiss the cross-appeals is denied. Federal Rule of Appellate Procedure 28 (h) says that for purposes of applying Fed.R.App.P. 30 in a case involving one or more cross-appeals, the party who filed the first notice of appeal is the "appellant." Since the O'Callaghans filed their notice of appeal first, they alone were "appellants" for purposes of determining the parties' obligations under Rule 30(b). Thus, their argument that appellees/ cross-appellants failed to meet their Rule 30(b) obligations fails.

With regard to an appendix, the court directs the cross-appellants to prepare and file a new Appendix directed only at the claim(s) raised by the cross-appeals.

Appellants' motion to disqualify counsel for appellee/ cross-appellant Hon. Gail L. Perlman is denied. The O'Callaghans have failed to explain how appellee Sacks' brief contact with co-appellee Perlman's' law firm created a conflict of interest; and we see no conflict. Finally, appellees/ cross-appellants have moved for an appropriate procedural and scheduling order. The request is allowed, and the clerk is directed to set an appropriate schedule for the cross-appeals.

The judgment in Ct. App. Nos. 00-1148 and 00-1323 is affirmed. See 1st Cir. Loc. R. 27(c). The motion to consolidate is allowed in part; Ct. App. Nos. 00-1149, 00-1150, 00-1151, 00-1152 and 00-1153 are consolidated; the motion for a procedural and scheduling order is allowed; the Clerk is directed to set an appropriate schedule for the cross-appeals; appellants' motion to stay has been withdrawn; all other pending motions are denied. Cross-appellants are directed to prepare and file an Appendix in accordance with the procedural and scheduling order to be issued by the Clerk.

[All cross-appeals were withdrawn.]

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 00-1148 and 00-1323

DANIEL J. O'CALLAGHAN; ALISON E. CLAPP O'CALLAGHAN,

Plaintiffs-Appellants,

v.

HOMAYOUN SHIRAZI, M.D., ET AL.,

Defendants-Appellees.

JUDGMENT

Entered: May 3, 2000

These causes came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed. See 1st Cir. Loc. R. 27 (c).

By The Court:

Phoebe D. Morse, Clerk

By: _____
Chief Deputy Clerk

APPENDIX E – OPINION OF UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 8, 2006

No. 06-1349

ALISON E. CLAPP O'CALLAGHAN, ET AL.,
Plaintiffs, Appellants,

v.

HOMAYOUN SHIRAZI, M.D., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, *U.S. District Judge*]

Before
Torruella, Selya, Howard,
Circuit Judges.

Daniel J. O'Callaghan and *Alison E. Clapp O'Callaghan* on brief pro se.

Harvey Weiner, *John J. O'Connor* and *Peabody & Arnold LLP*, *Dennis R. Anti*, *Susan Sachs* and *Morrison, Mahoney & Miller*, *Katherine A. Robertson* and *Bulkley, Richardson and Gelinas, LLP*, *William C. Newman* and *Lesser, Newman, Souweine & Nasser*, *John P. Pucci*, *C. Jeffrey Kinder* and *Fierst & Pucci*, and Thomas A. Barnico, Office of the Attorney General, Mary Lynn Carroll, pro se and Susan Schroder, pro se, on brief for appellees.

November 8, 2006

Per Curiam. After a thorough review of the record and of the parties' submissions, we affirm the district court's denial of the Fed. R. Civ. P. 60(b) motion.

To the extent that the appellants, Alison E. Clapp O'Callaghan and Daniel J. O'Callaghan ("the O'Callaghans"), sought relief under Rule 60(b) (5) and/ or (6), we review the denial of the motion for an abuse of discretion. *See United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990). "It is well settled that courts will not disturb final judgments unless the moving party demonstrates the existence of extraordinary circumstances." *Id.* at 660 (citing *United States v. Swift*, 286 U.S. 106, 119 (1932)). Ordinarily, a change in decisional law is not considered an "extraordinary circumstance" justifying relief from judgment. *See United States ex rel Garibaldi v. Orleans Parish Sch. Bd.*, 397 F.3d 334, 337-38 (5th Cir. 2005). (Supreme Court decision clarifying law and resolving circuit split was not an "extraordinary circumstance" justifying relief under Rule 60(b)); *Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefit Fund*, 249 F.3d 519, 524-25 (6th Cir. 2001) (notwithstanding change in decisional law, equity favored denial of Rule 60(b)(6) motion, given the amount of time that had passed since final judgment; reliance of parties upon that judgment; and public policy favoring finality of judgments). Moreover, a motion filed pursuant to Fed. R. Civ. P. 60(b) (5) or (6) must be filed within a reasonable time. *See* Fed. R. Civ. P. 60(b). In determining whether a Rule 60(b) motion has been filed within a reasonable time, the court should consider "whether the parties have been prejudiced by the delay." *Id.*

We see no extraordinary circumstances here that would have justified the district court in allowing the motion. The Supreme Court's recent decision in *Exxon Mobil Corp. v.*

Saudi Basic Ind. Corp., 544 U.S. 280 (2005), is not an extraordinary circumstance, as that decision only clarified existing law. Moreover, substantial prejudice would result if this judgment were reopened, and, as the appellees correctly note, the prejudicial effects would be difficult to quant6ify. This dispute originated as a guardianship petition, and the subject of that petition – Hortense Clapp Pollard – has been dead for over four years. Pollard's will has been probated and her assets have been distributed. The O'Callaghans' request to reopen these proceedings not only could prejudice severely those who long ago inherited from Pollard, but it seemingly would require the federal courts to (once again) second-guess the final judgments of the state court that probated Pollard's will.

Because we find no extraordinary circumstances present, and because it appears that allowing the motion under either Rule 60(b) (5) or (6) would have resulted in significant prejudice, the lower court did not abuse its discretion in denying the motion.

To the extent that the O'Callaghans sought relief on the basis that the original judgment was void, *see* Fed. R. Civ. P. 60(b) (4), the court reviews a denial of the motion de novo. *See Esso Standard Oil Co. (P.R.) v. Rodriguez*-Perez, 455 F.3d 1, 4-5 (1st Cir. 2006). We find no error in the court's denial of the Rule 60(b) (4) motion, because the original judgment in this case is not void. "There are only two sets of circumstances in which a judgment is void (as opposed to voidable). The first is when the rendering court lacked either subject matter jurisdiction or jurisdiction over the defendant's person. [] The second is when the rendering court's actions so far exceeded a proper exercise of judicial power that a violation of the Due Process Clause results." *Farm Credit Bank v. Ferrera-Goitia*, 316 F.3d 62, 67 (1st Cir. 2003) (citing *Boch Oldsmobile*, 909 F.2d at 661).

The O'Callaghans do not claim that the district court lacked subject matter jurisdiction over this dispute; indeed,

they say the opposite, that is, that because *Rooker-Feldman* does not apply, the district court did have subject matter jurisdiction. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983) (federal courts lack subject matter jurisdiction over challenges to state court decisions). Accordingly, the Rule 60(b) (4) motion should have been granted only if the district court's original decision "so far exceeded a proper exercise of judicial power that a violation of the Due Process Clause result[ed]". *Farm Credit* Bank, 316 F.3d at 67. We see no such exercise of judicial power, and the O'Callaghans do not explain how the court's original judgment could be so characterized. Indeed, we would be hesitant to say a court's decision that is lacked the power to act in a matter (because it lacked subject matter jurisdiction) could be said to have exceeded the court's power. In any event, the O'Callaghans only argue that the court's original decision was wrong (because it improperly applied the *Rooker-Feldman* doctrine), not that it was an improper exercise of judicial power. Their argument is insufficient to establish that the judgment was void. "A judgment is not void merely because it is or may be erroneous [] or because the precedent upon which it was based is later altered or even overruled." *Boch* Oldsmobile, 909 F.2d at 661 (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940)).

Upon review of the appellees' motion for sanctions pursuant to Fed. R. App. P. 38, we deny the motion.

Affirmed. See 1st Cir. R. 27(c).

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 8, 2006

No. 06-1349

ALISON E. CLAPP O'CALLAGHAN, ET AL.,
Plaintiffs, Appellants,

v.

HOMAYOUN SHIRAZI, M.D., ET AL.,
Defendants, Appellees.

JUDGMENT
Entered: November 8, 2006

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: the district court's denial of the Fed. R. Civ. P. 60(b) motion is affirmed.

The appellees' motion for sanctions pursuant to Fed. R. App. P. 38 is denied.

By the Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

Certified and Issued as Mandate
Under Fed. R. App. P. 41.
Richard Cushing Donovan, Clerk
S/_____
Deputy Clerk
Date: 2.12.07

APPENDIX F -- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED FEBRUARY 5, 2007

No. 06-1349

ALISON E. CLAPP O'CALLAGHAN, ET AL.,
Plaintiffs, Appellants,
v.
HOMAYOUN SHIRAZI, M.D., ET AL.,
Defendants, Appellees.

Before
Boudin, *Chief Judge*,
Torruella, *Circuit Judge*,
Selya, *Senior Circuit Judge*,
Lynch, Lipez and Howard, *Circuit Judges*.

ORDER OF COURT
Entered: February 5, 2007

Pursuant to First Circuit Internal Operating Procedure X C, the request for en banc rehearing has been treated as both a petition for rehearing en banc and for rehearing before the original panel. For all of the reasons set out in this court's Judgment of November 8, 2006, we deny the petition for panel rehearing.

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:
Richard Cushing Donovan, Clerk.
By: S/ MARGARET CARTER
Chief Deputy Clerk.

APPENDIX G – MEDICAL RECORD EXCERPTS

Jay Fleitman, M.D.

8/20/94	CDH: "... fell in the kitchen ..."
4/22/95	CDH: "... slipped on getting up tonight and fell striking the back of her head and then the nasal area."
6/23/96	CDH: "... she fell out of bed ..."
4/17/97	CDH: "... injuries to left leg ... pt. has an attorney Kenneth Bowen ... who assists w her finances"
11/8/97	CDH: "slipped on slippery floor ... twisted r. foot"
11/14/97	CDH: "tripped over dog. Fell against table... fractured nose, fractured rib"
12/22/94	Fleitman Notes: "Pt. fell 2 wks ago – now has fear about going out"
6/14/96	Fleitman Notes: "Still has momentary episodes when feels unstable ... might fall"
7/19/96	Fleitman Notes: "... fell 3 weeks ago; on face ..."
12/16/96	Fleitman Notes: "(tc) Susan – pt.'s caretaker; pt. has been advised to have surgery by Dr. Wojcik but still won't agree to it"
1/9/97	Fleitman Notes: "tc Susan Schroder. Hasn't scheduled app't. as pt. refuses to have surgery"

11/12/96 J.B. Wojcik, M.D., Baystate Surgical Group:

"... Hortense Pollard regarding her ... As you are well aware, she has had this diagnosis for the better part of the summer, but has been unable to arrive at a decision ...

"I have spent quite some time with her to explain in detail the ramifications of her diagnosis ... Her inability to appropriately discuss the findings and arrive at a sound conclusion has been trying.

"My feeling has been that as a minimum, she should undergo ...[surgery]. She has been totally unapproachable ... At this point she has resisted any surgery and I have instructed her to carefully weigh her options. ...."

4/17/97 Fleitman Notes: "(tc from CD...) ... following a fall at home ... recommends daily VNA service"

4/17/97 Fleitman Notes: "tc N'ton Ambulance -- ... bringing her back to ED w the hope of getting a soc. Service eval. ..."

4/18/97 Fleitman Notes:".. pt. went to Mediplex today ..."

11/14/97 Fleitman Notes: "tc pt. has had rectal bleeding x several weeks ... this is part of rectal Ca: the approach remains surgical. ...."

11/14/97 Fleitman Notes: "tc ... pt. fell over her dog ... hit head on a table"

11/24/97 Fleitman Notes: "Face: Melanoma has redeveloped ... "Rectal polyp ..."Melanoma"

12/1/97 "... pt. has decided to see Dr. Brown again."

3/6/98 "Allison Klapp ... : wants to talk 3/6"

3/10/98 "Allison Klapp (2nd cousin) notes ... confusion, falling. Concerns about financial misgivings."

3/23/98 "... Hospice Alliance called: ... [E&S] called ... to do nursing assessment for Hortense for home care needs. Is this OK ... you?

Yes!"

3/31/98 "... Long discussion re recent legal-proceeding guardianship
H has fired lawyer Bowen
... VNA w/ falls ...
An attempt was made to do mental status testing: She identified date as April 4, 1989 despite repeated indications this was not correct. Had difficulty producing my name... could not identify President, Mayor
She then became agitated – indicating she was insulted & wanted to leave...
Attendant often would not allow her to speak"

4/15/98 "Gail Perlman – discussed impressions re Hortense Pollard, family, caregivers."

Cooley Dickinson Hospital/
10/3/70 - 11/14/97

8/20/94 Social History: patient lives alone with her dog. Nearest relative – Mary Pollard Sullivan. ....

Discussed health care proxy issues with her and she is a little too upset ... she feels Mary Pollard Sullivan is most likely the person closest to her... She cannot grasp the concept of quality of life. Further discussion needed ... Jeffrey Zesiger, M.D.

8/22/94 Social History ... neighbors are friends

8/22/94 ... Mrs. Sullivan does not want to be involved ... & directed me to pt.'s cousin in New York.

8/24/94 Tc to Allison Clapp, cousin of patient she said that Dr. Kurtis told her that her aunt could return home ... in one week ... Allison would like to meet ... me to discuss DC Planning.

8/25/94 Meeting ... Allison & Daniel Clapp & pt. Explained to them that pt. was at SNF level of care ....

8/26/94 ... Dr. Kurtis was clear to patient that she could not return home in present physical condition. He told Mrs. Pollard she would need S.T. Placement at a facility. Mrs. Pollard continues to ask about care at home ...

8/30/94 Spoke w/ pt. today ... she is open to placement at a skilled nursing facility. Referrals given to Mediplex & Linda Manor.

8/31/94	Pt. accepted at Linda Manor N. H. today … N. H. notified patient cooperative & in agreement w/ plan.
8/20/94	Relative or guardian: Allison Clapp
[no date]	Hortense Pollard … 86 yr. old woman. She lives alone … her closest relative is a cousin Allison Clapp who lives in Brooklyn, New York… Allison is very involved & wants to be involved in DC planning.
8/28/94	Discharge planning … who would provide you help after discharge? Wd. like VNA, if possible. … Additional information: Allison Clapp (relative, a cousin).

Linda Manor/ 8/22/94 - 10/5/94

8/22/ 94 "Pt. has no one to rely on for help. One sister-in-law Mary Sullivan was called. She agrees that pt. should not return home. Mrs. Sullivan … directed me to pt.'s cousin in New York. …."

"… will begin careful discharge planning on a pt. who is 86 yrs. old & too frail to return home."

8/24/99 "tc to Allison Clapp cousin … I discussed SNF placement short term & benefits to pt. Allison would like to meet me to discuss DC planning … pt. could come home when independent – no date guaranteed."

8/25/94 "Meeting w Allison and Daniel Clapp and pt. Explained to them that Pt. was at SNF level of care … I made it clear that we will carry out a SNF search …"

8/26/94 "Dr. Kurtis was clear to patient that she could not return home in present physical condition."

8/31/94 "Watch anxiety …~~Consider~~ **Needs healthcare proxy**."

8/27/94 "Social Evaluation" "Church [blank]" "Discharge Plans: has a cousin in NY, Alison Clapp, …"

"Hortense Clapp Pollard was born in Northampton MA on 8.11.08, the second dtr of a prestigious Northampton family … Tufts University … Radcliffe University … She then returned to N'ton to live with/ her father (her mother had died when she was 16) & her sister. After her father died she continued to live in

family home with her sister & her husband. When her sister died, she married [at 61] her sister's husband [70]. She has been living alone since his death about 10 years ago."

"Hortense can best be described as eccentric. She is set in her ways, and has dependent personality characteristics. Apparently she was taken care of by others for most of life...."

9/2/94 "She is alert & oriented but has periods of forgetfulness ... "

9/13/94 "Rehab staff who accompanied Ms. Pollard on home eval have expressed many concerns about safety of home environment and of Ms. Pollard's inability to recognize environmental hazards...."

9/28/94 "Have talked w/ Ms. Pollard's cousin a # of times about d/c plans ... Miss Pollard ... remains mildly confused ...

10/5/94 "Cousin arrived from N.Y. & is accompanying her to orthopedic MD. Hortense will be going home with cousin ..."

Mediplex - 4/18/97 - 4/30/97

4/18/97 - 4/30/97	"Plan of Treatment … "20. Current … Status: anxiousness/ poor safety awareness "20. Initial Assessment … friend stay with her in the evenings – friend … also frail. "21. Functional Level: no LTG's have been met … as pt. wished to return home, she was d/c via ambulance … 24 hr care …"
4/21/97	"Team Meeting 4/21/97 "… diagnosis of fractured pelvis… "**Resident is confused, disoriented at times**" "Resident will require 24 hr. supervision upon discharge"
4/18/97	"Occupation Therapy …" "Cognitive/ visual … impulsive; poor safety awareness"
4/18/97	"Pt. admitted from CDH via w/c"
4/18/97	"She doesn't like to take medication, … pt. refused to take … pt. was asked why she didn't want to take it, pt. stated 'it isn't good for me' Pt. would not elaborate any further …"
4/19/97	"Pt. alert & confused"
4/19/97	"Pt. alert and confused at times … states 'she was wondering who is in the house' Orientation improved after pt. reminded of where she is and why"
4/20/97	"States she doesn't believe in pain medicine …"

4/20/97 "At times is confused w surroundings and needs reorientation to place and time … pt. states she is 'very anxious to return home to her dog'"

4/20/97 "Pt. is alert w slight periods of confusion. Pt. states: 'I want to see my Dr. Monday. I want to go home.' Pt. refuses medicine for pain. … explained the benefits of pain relief for her recovery & that it is not helping her healing progress being in so much pain that she doesn't want to walk and stuff. She refuses pain meds."

4/21/97 "Plan is to follow up with social worker to provide pt. w 24 hr. care at home"

4/21/97 "Pt. is confused. Discussed pending discharge & pt. states '**I don't want to go home**' Two hours later, patient states '**All I want to do is get out of here.**' Pt. is very upset that she has pills to take. I explained all of her meds, i.e. the antibiotic & its usage & why she needed it. I explained again the stress she is placing on herself being in so much pain & refusing any type of pain relief i.e. tylenol. … **This writer reported to Social Service … the patient's continual change of heart in being sent home.**"

4/23/97 "Alert; states, 'I feel depressed.' 'I just hate all this help I need' … not as noisy talking **hallucinations** as last week"

4/24/97 "Discharged…"

Visiting Nurses Association
4/25/97 - 6/25/97; 11/15/97- 01/15/98

4/25/97 Home Health Certification and Plan of Care

11. ... Diagnosis ... pelvic fracture ... urinary tract ... diverticulosis of colon hypertension... fx. neck of femur

15. Safety ... rugs unsecure/ scatter rugs, furn/ elec cords clutter

18. Functional limitations: Mental

19. Mental status: forgetful ...

20. Prognosis: fair

21. Orders for Discipline and Treatments
    Skilled Nursing ....
    Restorative Nursing ...
    Teach ... teach ...
    Assess mental status ...
    Teach ...
    Assess safety ...
    Teach environmental safety ...
    Establish home program ...

22. Clinical summary ...
    Diabetes ... palpitations ... wound ... Pt. refuses to use percocet for pain. Tremors ...

    Psycho social risk factors: at risk for self-injury due to living alone, diminished endurance, weakness ... assess edema ... Patient requires skilled observation

and continual assessment of safety, mental status ... Patient requires repeated instruction because of forgetfulness ...

4/28/97 Physical Therapy Note ... Homebound Status ... confused, disoriented, lacks judgment ... unable to climb stairs without stopping due to severe fatigue and dyspnea

4/30/97 Physical Therapy Note ... Homebound Status ... confused, disoriented, lacks judgment ...

5/2/97 Physical Therapy Note ... Homebound Status ... confused, disoriented, lacks judgment ...

6/16/97 Physical Therapy Note ... Review ... Pt. continues at times to forget to use cane in the home to ambulate
Interventions ... Pt. continues to require verbal cues for proper sequencing ...

4/30/97 Occupational Therapy ... Note ...
Progress ... client and care-giver agree that skilled O.T. is not needed ... because client has been dependent upon care-givers for many years and chooses to continue with that level of care ....

11/15/97 Home Health Certification and Plan of Care

10. Medications ... Propoxyphenl - N...Prilosec ...Triamterene ...Procardia ...Atenolol ...

11. Diagnosis ... Fx mult. Ribs; ... nasal bone fx; ... hypertension; ... diverticulosis of the co.; ... diabetes

19. Mental status ... forgetful ...

20. Prognosis: fair

21. Orders for Discipline ... Treatments ... Assess mental status. Teach ... safety ...

22.Goals ...
Clinical summary
... Frail ... Edema ... Dyspnea: on exertion; Cyanosis: rt. lower leg ... Cardiac ... unaware that she is on procardia or what it is for ... G.I.: have polyp which bleeds; refusing tx... feeding: taking carnation instant breakfast 3 x day to supplement ... tremors ...

Present Behavior: confused, alert, questionable judgment.

Psycho-social risk factors: weak, does not know names of meds or why she is taking them ... Instructions begun in: ... teach ... teach ... teach ... response to teaching: fair.

Interventions provided: Skilled Nursing. Patient requires skilled observation and continual assessment of frailty and pot. for injury ... Patient requires repeated instruction because of forgetful. The patient receives support from neighbor/ hired for all adls meals, housekeeping. Patient requires home health aide for personal care.

12/03/97 S.N. [Skilled Nursing] note ...Health ..G.I... having rectal bleeding; has rectal polyp. ?cancerous
Clinical ... inc. in ankle edema

Homebound Status ... needs assistance ... to

leave the home.

12/09/97 S.N. note
Interventions ... Assess Mental Status ... has malignant rectal polyp with bleeding
Has melanoma of rt. face
Against having any further treatment ...

Jeffrey A. Zesiger, M.D. - 4/6/98 -

4/6/98 O: ... **memory on brief exam is diminished**....

[*Three (3) days prior to the hearing upon the Motion for Temporary Guardianship held April 9, 1998]*

A/P: **Some decrease in memory on brief exam today** ....

Old records Dr. Fleitman, record release for Fleitman and Reverend Ives whom she requests I speak to get a full picture of recent events.

... colon polyp ... Recommendation for removal given but patient declined being **very fearful of surgery**. **Feels she would not wake up after surgery**....

HTN

S: Long-standing hypertension now treated with three meds ...

O: ... patient looks somewhat frail, mild to moderately kyphotic ... timid

5/11/98 Under much stress

S: DOE c stairs ...

pt. doesn't remember ...

Edema .. heavy L foot ... ... L chest heaviness

O: Frail Elder. ...

MSE [mental status exam] Vague. Distractable.

P: ... Instability

Legal Gail Perlman = guardian ad litem

7/20/98 ?TIA/ ?SZ **[Transient Ischemic Accidents/ Seizures]**

S: ... 10 seconds of arched back, unresponsive while sitting in chair ... Patient does not remember ...

O: Cranial nerves II-XII, except V, are normal. V not checked. ...

A/P: Episode of spinal rigidity, consistent with short seizure, TIA 2nd possibility. Patient not interested in work-up. Might be interested in treatment but cannot treat without knowing what it is, explained to her. ... Patient's memory continues to have small deficits that appear worse when she gets nervous. ....

Letter to Hortense. ....

8/25/98 Phone ... Schroder Hearing pending guardianship soon. Pt. anxious; court psychologist says she's competent. Updated me.

8/28/98 Home aide reports few minor episodes of unresponsiveness this a.m. Per JAZ to ER [Emergency Room]. Pt. ref. to go to ER; very anxious re this. Will call back ... I called ... had another episode lasting 5 sec. Stiffening noted. Did not become unresponsive. Pt. ref. to go to ER. for eval. ....

8/31/98 Had 5-6 brief episodes of grabbing cushion, head felt heavy lasting 30 sec. Next day had which she slid ... the floor. No episodes since.

...Stress.

?TIA

S: Had several episodes, see above. ....[R.P.], her Monday support person in with her today. One episode two days ago of a fall where she slid to the floor ... only pain from that is left lateral thorax ...

Head felt heavy when episodes began three days ago ... ... Mother died of a stroke when Hortense was sixteen.

O: Cranial nerves II-XII intact, sensory V not checked. ... Gait moderately unstable ...

A: Probable TIA's. Patient adamant in not wanting further evaluation or surgery. Might consider medicine. Discussed those options and she agrees to ASA QD [aspirin ...]

RV [reevaluate/ revisit] two months. ...[R.P.] will call with judge's name so I may talk to him or her.

Side effects of aspirin discussed carefully, increased rectal bleeding ....

9/10/98 Her ... Schroder... pt. having rectal bleeding since started aspirin...

9/30/98 Phone Atty Ellen Randall 413 - 272-6221 re court appearance safety ... Letter to be picked up in a.m. [Dr. Zesiger's handwritten letter to Judge Dunphy dated 9/30/98]

10/21/98 Three days pt. visit to New Haven.

Seizure activity while asleep lasting 30-60 seconds. ... [aspirin dosage] increased ...

HTN/ Dementia/ Stress/ TIA

S: ...Rectal bleeding pt denies but ... Caroline

[Brandt] …reports a little bleeding once in a while.

O: Pt at her baseline. Forgetful. …. Finger to nose mild to moderate tremor … Mildly unstable on gait. …

12/11/98 In for pre-op PE for pre-op surgery

R. cataract

S: Scheduled for surgery next week with Bleiman. ….

O: …. **Mentation: markedly decreased memory.** … Left foot somewhat cool, r. warm (has been this way chronically) No pedal pulses and poor capillary refill.

A/P: …. RV [reevaluate/ revisit] 6 months.

Dr. Zesiger identified three (3) letters previously unknown/ unproduced:

(i) September 30, 1998 – at the request of BR&G's Randle, Dr. Zesiger prepared this letter to the Hon. Sean M. Dunphy;

(ii) March 2, 1999 -- BR&G to Dr. Zesiger re purported tax considerations; and

(iii) March 4, 1999 -- Dr. Zesiger replies that Hortense "**would be at a very high risk of grave bodily harm from falls … … certainly be in a nursing home if it were not for her 24-hour a day care.**"

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(2)

No. 06-1464

FILED

JUN 6 - 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ALISON E. CLAPP O'CALLAGHAN
and
DANIEL J. O'CALLAGHAN,

Petitioners,

v.

HOMAYOUN SHIRAZI, M.D.; SEAN M. DUNPHY; DAVID G. SACKS; GAIL L. PERLMAN; BULKLEY, RICHARDSON & GELINAS, LLP; PETER B. IVES, REVEREND; THE FIRST CHURCHES OF NORTHAMPTON; CORASH, ZURN & BELSKY, LLP; SUSAN C. SCHRODER; and MARY LYNN CARROLL, ESQ.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

The Petitioners' statement of issues is incorrect. The question presented by the petition is as follows: Whether the Courts below properly exercised their discretion in denying the Petitioners' Rule 60(b) motion to vacate a six-year-old judgment where: (1) there had been no significant change of law or circumstances; (2) the Petitioners were seeking federal review and nullification of a state probate court judgment; (3) the requested relief would have unfairly prejudiced the Respondents; and (4) the state courts, District Court, and First Circuit had repeatedly considered and rejected as meritless the same essential arguments years before?

STATEMENT REGARDING THE PARTIES

All parties to the proceeding are listed in the case caption.

STATEMENT PURSUANT TO RULE 29.6

No publicly held company owns 10% or more of the First Churches of Northampton.

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INTRODUCTION

The "*pro se*" Petitioners are New York City attorneys with 60 years combined legal experience. In 1999, unhappy with case-specific rulings in a Massachusetts Probate and Family Court ("Probate Court") guardianship proceeding that they had commenced, the Petitioners filed suit in Federal District Court against ten parties: multiple state judges, judicially appointed professionals, Probate Court employees, a local minister and church, and others associated with the state proceedings. The Petitioners' essential allegation was that the defendants/respondents ("Respondents") all were conspiring to subvert the pending guardianship proceedings and frustrate the Petitioners' efforts to have the Petitioner Alison O'Callaghan appointed co-guardian of a distant, elderly, wealthy relative. The Petitioners asked the District Court to issue an injunction and supervise the Massachusetts Probate and Family Court. The Respondents filed oppositions and motions to dismiss.

The District Court properly declined to enjoin the guardianship matter. A trial in the Probate Court followed. The Petitioners called only one witness: a court-appointed guardian *ad litem* who, in reliance on the findings of a court-appointed physician, her own observations, and other evidence had concluded that no guardianship was necessary. Her testimony was not supportive of the request for a guardianship. The Probate Court denied and dismissed the guardianship petition in June 1999. The Petitioners appealed.

Thereafter in the federal action, the District Court granted the Respondents' motions and dismissed the action in its entirety. Noting that the Petitioners' submissions

were "compendious, confused, and confusing," the District Court held that, under the *Rooker-Feldman* doctrine, it lacked subject matter jurisdiction, and that it would abstain in any event. The Petitioners appealed. Before the Respondents had even filed their brief, the First Circuit on May 3, 2000 issued an opinion summarily affirming. Since then, the Probate Court's dismissal of the guardianship petition has been affirmed by the Massachusetts Appeals Court, the subject of the guardianship proceeding has died, and her estate has been fully probated, distributed, and closed.

In 2005, six years after the District Court's dismissal, the Petitioners resurfaced and filed a motion pursuant to Fed. R. Civ. P. 60(b) seeking relief from the 1999 judgment. The ostensible basis of the motion was a new decision by this Court, but the Petitioners' essential argument was not new: the District Court's *Rooker-Feldman* analysis was wrong initially and *remained* wrong for the same reasons. The District Court denied the Petitioners' motion. The Petitioners appealed, and the First Circuit again affirmed. The lower orders and judgments unquestionably were correct. There is no need for review by this Court.

STATEMENT OF THE CASE[1]

I. THE UNDERLYING MASSACHUSETTS PROBATE PROCEEDINGS

1. In March 1998, the Petitioners filed a guardianship petition in the Hampshire County Division of the Massachusetts Probate and Family Court. The Petitioners requested that a guardianship be created for proposed ward Hortense Clapp Pollard ("Pollard"). The Petitioner Alison E. Clapp O'Callaghan claimed to be an heir of and second cousin to Pollard. The Petitioners requested that Alison O'Callaghan and Kenneth B. Bowen be appointed as Pollard's guardians, on the ground that Pollard suffered from mental illness. Pollard objected to the petition, alleging good health and full capacity.

2. At the time, Pollard was in her nineties and a wealthy woman with substantial holdings, including at least three parcels of real property. Pollard resided in Northampton, Massachusetts, where she was under the care of home health-care workers. The Petitioners are attorneys who have lived in New York City (approximately 161 miles from Northampton) for many years.

3. After the commencement of the Petitioners' guardianship proceedings, with the assent of the Petitioners and Pollard, the Probate Court appointed as guardian *ad litem* the Respondent Judge Gail Perlman, who was then a Northampton-based attorney with twenty years probate experience. The Probate Court ordered Perlman to conduct an investigation and to submit a report concerning the

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[1] The following statements of fact are based on the judicial filings and other materials that comprised the record before the District Court and the First Circuit.

pending guardianship petition. The Court also appointed the Respondent Dr. Homayoun Shirazi to examine Pollard as to her mental status and competency. Pursuant to the Probate Court's order, Perlman met with Pollard, O'Callaghan, and others with information bearing on the petition. For his part, Dr. Shirazi examined Pollard and found her competent.

4. On or about May 28, 1998, Perlman filed her report with the Probate Court. In the report, Perlman noted Dr. Shirazi's finding that Pollard was not mentally ill and did not require guardianship. Based on this finding, Perlman made a number of recommendations to the Probate Court as to steps to be taken to protect Pollard's interests short of creating a guardianship. Dr. Shirazi also submitted a report discussing his findings.

5. On September 28, 1998, Perlman was sworn in as a justice of the Massachusetts Probate and Family Court. Other than as a testifying witness in the guardianship trial, she had no further involvement with the guardianship proceeding.

6. The Probate Court trial on the guardianship petition took place on June 1, 1999. The Petitioners called only one witness – Judge Perlman – whose testimony was adverse to the Petitioners' position. They rested the same day. The Probate Court issued detailed findings of fact and conclusions of law, and ruled against the Petitioners. The Court dismissed the guardianship petition on June 25, 1999. The Petitioners appealed, the Appeals Court affirmed, and the Supreme Judicial Court denied further review. *See Guardianship of Pollard*, 54 Mass. App. Ct. 318, 322-324, *rev. denied*, 437 Mass. 1103 (2002).

II. THE FEDERAL ACTION

1. On April 29, 1999, about five weeks before the Probate Court trial, the Petitioners commenced the instant Federal action against virtually everyone who has had any connection with the Probate Court guardianship proceeding or underlying events, including three sitting judges and an assistant register of probate. The Petitioners sought injunctive and declaratory relief and, as against some defendants, damages.

2. The Petitioners vaguely alleged that, after she became a judge of the Probate and Family Court, Judge Perlman communicated with other judges on the Probate Court who were involved in the guardianship proceeding. The Petitioners implied that such communications concerned the guardianship proceedings, but offered no evidence in support of that suggestion and no evidence concerning the substance of any such communications.[2]

3. For relief, the Petitioners requested that Judge Perlman's May 28, 1998 Report and Recommendation be excised from the Probate Court record, and that Judge Perlman be disqualified. They sought a "declaration" that the "Judicial Defendants" violated the Petitioners' unspecified due process rights. The Petitioners also sought an injunction directing the course of the Probate Court proceeding and trial.

4. On May 27, 1999, the District Court held a hearing on the Petitioners' request for an injunction. During

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[2] The Petitioners had the opportunity to conduct Judge Perlman's deposition, but never did so. When they called Judge Perlman as a witness at trial, the Petitioners did not ask about these alleged communications. There was no evidence of improper communications.

the hearing, the Court expressed doubt as to the existence of federal jurisdiction, and the petitioner Daniel O'Callaghan *repeatedly conceded* that he also had doubts about the Court's jurisdiction. From the bench, the Court denied the injunction and ordered that motions to dismiss be filed. The Respondents all moved to dismiss.

5. On June 21, 1999, the Petitioners filed their Amended Complaint. The Amended Complaint added eighty-six new allegations and specifically criticized the Probate Court's conduct of the earlier (June 1) guardianship trial. The Respondents renewed their motions to dismiss.

6. The Petitioners also filed a variety of motions on procedural and collateral matters. In relation to these filings, on July 7, 1999 the District Court denied the Petitioners' motion under Rule 15 to amend their complaint as to Judge Perlman and Susan Schroder. On August 24, 1999 the Court denied the Petitioners' motion for leave to conduct a medical exam pursuant to Rule 35.

7. In a well-reasoned opinion dated December 22, 1999 (six months *after* the Probate Court's final decree), the District Court granted the motions to dismiss. Citing the *Rooker-Feldman* doctrine, the District Court found the action to be "nothing other than a collateral attack upon interlocutory orders and a final judgment in a state court guardianship proceeding." The Court also noted that, in any event, abstention was appropriate because the state proceedings were presumptively adequate and involved

probate issues of particular concern to Massachusetts. (App. 2a-3a)[3]

8. On December 29, 1999 the District Court denied as moot the Petitioners' motion for expedited relief. On January 13, 2000 the Court denied the Petitioners' motions for recusal and for discovery pending appeal, as both requests were made after the case was dismissed. On February 8, 2000, the Court denied the Petitioners' motions to reconsider, for the posting of a bond by the Respondents, and (again) for discovery pending appeal. On the same date the Court also deferred to the First Circuit the Petitioners' motion to disqualify counsel for Judge Perlman, and granted the Respondents' motion for an order requiring that the Petitioners post an appeal bond.

9. The Petitioners appealed. The First Circuit summarily affirmed before the Respondents had filed their brief. *O'Callaghan v. Shirazi*, 215 F.3d 1312 (1st Cir. 2000). The Court affirmed the District Court's orders as to appeal bonds and recusal of the District Judge. The Court ruled that the following orders/pending motions by the Petitioners were moot: (1) for discovery pending appeal; (2) for an injunction pending appeal; (3) for an expedited appeal; and (4) for retention of certain appendices. The Court also denied the Petitioners' motion to disqualify Judge Perlman's counsel. The Petitioners did not request a writ of certiorari. (App. 5a-8a)

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[3] Citations to the Appendix included in the Petition For Writ of Certiorari appear as: (App. [page]). Citations to the Petition appear as: (Pet. for Cert. at [page]). Citations to the Petitioners' 2006 First Circuit brief appear as: (Pet. First Cir. br. at [page]).

10. Pollard died on August 7, 2002. Her estate has been probated, distributed, and closed.

11. On October 26, 2005, following issuance by this Court of the decision in *Exxon Mobil Corp. v. Saudi Basic Ind. Corp.*, 544 U.S. 280 (2005), the Petitioners filed a motion for relief from judgment pursuant to Rule 60(b). The Respondents filed a detailed opposition with exhibits.

12. The District Court denied the motion on December 29, 2005, finding that the Petitioners had failed to show good cause to revive the matter. The Petitioners appealed. The First Circuit affirmed. (App. 11a-13a)

REASONS FOR DENYING A WRIT OF CERTIORARI

The Petitioners have failed to identify any reason – let alone a compelling reason – why review by this Court is in order. They do not allege the existence of a circuit split or a federal/state conflict, or that the First Circuit decision clashes with decisions of this Court. Nor do they allege that there is some open issue that should be resolved. Rather, the Petitioners have simply recycled the same "confused and confusing" arguments (App. 2a) that they have previously presented over and over to the Massachusetts state courts, the District Court, and the First Circuit. For the following reasons, these arguments merit no further consideration.

I. THE LOWER COURTS PROPERLY APPLIED RULE 60(b).

Rule 60(b) permits District Courts to vacate judgments in limited circumstances whenever necessary to accomplish justice. *Klapprott v. United States*, 335 U.S. 601, 614-615 (1949). The movant's burden is to show "extraordinary circumstances" justifying relief. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (citing *Ackermann v. United States*, 340 U.S. 193, 199 (1950) and *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 864, 873 (1988)). Whether to grant relief pursuant to Rule 60(b) is committed to the sound discretion of the District Court. *Browder v. Director, Dept. of Correc. of Ill.*, 434 U.S. 257, 263 n.7 (1998); *Agostini v. Felton*, 521 U.S. 203, 238 (1997). An order denying such a motion will not be reversed in the absence of an abuse of discretion. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988). The denial of a rule 60(b) motion is appealable, but only the order of denial is before the Court, not the underlying judgment. Appellate review is "limited and deferential." *Gonzalez*, 545 U.S. at 535; *Browder*, 434 U.S. 257 at 263 n.7.

The District Court and First Circuit decisions fall squarely within these general principles. Both Courts properly focused only on the order of denial. (*E.g.*, App. 11a-13a) Further, in affirming the District Court's denial, the First Circuit acknowledged that the Petitioners were required to show extraordinary circumstances. (App. 11a) The Court also acknowledged that an abuse of discretion standard applied. (App. 11a-12a) The Court's analysis flowed from these core principles, and was fully justified on the following grounds.

A. The Motion Was Untimely.

Rule 60(b)(1)-(3), which the Petitioners relied on in part, requires that motions asserting mistakes, newly discovered evidence, or fraud must be brought within one year of the allegedly erroneous judgment. The Petitioners' 60(b) motion violated this requirement and was therefore properly denied.

The Petitioners argued below that the District Court's 1999 judgment was erroneous in 2005 *and was erroneous in 1999 when rendered.* Their argument was the same below in 2005 as in 1999: *Rooker-Feldman* does not apply. For example, on page 1 of their 2005 Rule 60(b) motion, the Petitioners asserted that "*Rooker-Feldman* does *not* bar – *and never has barred* – Federal jurisdiction." (emphasis added) In their supporting memorandum, the Petitioners repeated this argument:

> [A] recent . . . United States Supreme Court . . . case . . . confirms the *long-standing* validity of Plaintiffs' meritorious grounds for Federal jurisdiction.

(emphasis added).

> Here, a *Rooker-Feldman* bar does not exist – and has not *ever* existed.

(emphasis added). Their First Circuit brief was to the same effect (Pet. First Cir. br. at 2, 24-26.), as is their current petition. (Pet. for Cert. at 14.)

Thus, the position is that the 1999-2000 decisions have *always* been mistaken for the *same* reasons that the Petitioners expressed in 1999 and 2005 in the District Court and the First Circuit. Given this posture, the Petitioners had only one year from the date of the judgment to

seek relief under Rule 60(b)(1)-(3). They failed to do so, so their motion was late.

Rule 60(b) provides that motions for relief under Rules 60(b)(4)-(6) can be brought later than one year post-judgment, but must still be brought within a "reasonable time." Even if this more lenient provision is applicable, the 60(b) motion was still fatally late. Judgment dismissing the suit issued in December 1999. The First Circuit affirmed in May 2000. As noted above, the Petitioners have believed *since December 1999* that the District Court's judgment was erroneous. During those years, the state court guardianship proceedings have run their course. Pollard has died, her estate has been fully probated and closed. By any reasonable assessment, the Petitioners' motion was much too late.

This Court's decision in *Exxon Mobil Corp.*, 544 U.S. 280, does not alter this point, for several reasons. First, *Exxon* does not apply "retroactively" here. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752, 758 (1995) (new decisional rules do not apply to finally decided, closed cases).

Second, as the First Circuit correctly noted (App. 11a-12a), there is no "significant" change of law sufficient to justify 60(b) relief. The Petitioners concede that *Exxon* does *not* represent a change of law:

> [T]he Supreme Court . . . in *Exxon* . . . identified the always limited application of *Rooker-Feldman*. Respectfully, this identification is/remains exactly in the same manner [sic] and to the same effect as Appellants have presented to the district court and to this Court since 1999. case [sic] commencement.

* * * * *

> [A] *Rooker-Feldman* bar does not exist – and has not ever existed.

(Pet. for Cert. at 14; *see also* Pet. First Cir. br. at 2, 24-26) The Petitioners are bound by the admission that *Exxon* only clarifies prior law.

Third, in any event, not all purported changes in law merit relief under Rule 60(b). *E.g.*, *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388, 405 (1992). All things considered, there was no reason why *Exxon* warranted vacation of the judgment, so the Petitioner's motion cannot be said to have been brought within a "reasonable" time in relation to *Exxon*.

B. There Are No Extraordinary Circumstances.

The relevant circumstances here are garden-variety, and far from extraordinary. The Petitioners brought an action in the District Court and filed numerous submissions and exhibits. They were fully and fairly heard both at the time of their motion seeking a preliminary injunction and in opposition to the Appellees' motions to dismiss. After the District Court had ruled on their many petitions and requests, they prosecuted an appeal to the First Circuit, which issued a thoughtful opinion analyzing and disposing of their contentions. All of the Petitioners' issues and requests were fairly and thoroughly considered.

No special circumstances have arisen since then. The only development cited by the Petitioners is this Court's *Exxon* decision in 2005 – six years following the original adjudication of the case. And the Petitioners do not even contend that *Exxon* is some exceptional departure from prior precedent. Instead, they say only that it bolsters the

same argument that they made six years ago – that the *Rooker-Feldman* doctrine does not apply here. Thus, even on *the Petitioners'* view of *Exxon*, the decision is not an extraordinary development.

And there is no other basis for such relief. The underlying factual circumstances *have* changed, but only in ways that militate *against* Rule 60(b) relief and in favor of finality: The proposed ward Pollard has died. Her estate has been fully probated, distributed, and closed. The Petitioners' appeal from the underlying Probate Court decree has been completed and the Probate judgment affirmed. *Pollard*, 54 Mass. App. Ct. 318. Six years have passed. These developments are all reasons why the Rule 60(b) request was properly denied.

C. The Requested Relief Would Unfairly Prejudice The Respondents.

Rule 60(b) relief is available in *limited* circumstances when required to accomplish justice. In analyzing requests for such relief, the importance of finality must be considered. *Liljeberg*, 486 U.S. at 873 (Rehnquist, C. J., dissenting) ("[S]trict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved."). Justice and finality would be hollow concepts indeed if the Petitioners were granted the relief they seek here. The proposed ward Pollard is dead and her estate distributed and closed. In the six years since the District Court and this Court first decided the Petitioners' claims, many parties have relied on that judgment, including the ten Respondents, defense counsel, the Probate Court, the Massachusetts Appeals Court, and all parties interested in Pollard's estate. Justice and finality should protect the reliance interests of

all of these parties and institutions against the undue confusion and prejudice that continued proceedings would entail.

D. The Judgment Is Not Void.

Federal authority over state judicial proceedings is exceedingly limited. "Federal Courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (quoting *Smith v. Phillips*, 455 U.S. 209, 221 (1982)). In an effort to skirt this principle, the Petitioners argue that the District Court's judgment is void and may be disregarded. This argument is meritless.

The void judgment concept is well established:

> A void judgment is from its inception a legal nullity. . . . In the interests of finality the concept of void judgments is narrowly construed. A judgment is not void merely because it is or may be erroneous, or because the precedent upon which it is based is later altered or even overruled. A judgment is void, and therefore subject to relief under Rule 60(b)(4), only if the court that rendered judgment lacked jurisdiction or in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process.

United States v. Boch Oldsmobile, Inc., 909 F.2d 657, at 661-662 (1st Cir. 1990) (citing *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940)).

The First Circuit correctly concluded that the void judgment concept is inapplicable. (App. 12a-13a) To begin

with, the Petitioners do not allege that the District Court lacked jurisdiction. The thrust of their position is that the District Court's dismissal somehow deprived them of due process. That claim is frivolous. The Petitioners' guardianship petition has been carefully considered by the Massachusetts Probate Court (which issued comprehensive findings of fact and rulings of law) and the Massachusetts Appeals Court. Their requests for federal intervention have been considered by the District Court twice and by the First Circuit twice. The order denying Rule 60(b) relief was correct and grounded in well-settled rules. Even if it is assumed *arguendo* that there was an abuse of discretion (there was not) and that the 60(b) motion should have been granted, that means only that there has been legal error as to the denial, *not* that the underlying judgment was void.

II. THE PETITIONERS' CLAIMS ARE SUBJECT TO DISMISSAL AND ARE MERITLESS IN ANY EVENT.

A. The Claims Are Moot.

The Petitioners' claims are now *entirely moot*. Regarding the equitable claims, the state guardianship proceedings have been finally decided, and Pollard died over three years ago. The prospective equitable relief that the Petitioners sought in 1999 cannot be granted now because the proceedings that the Petitioners had hoped to influence have been complete for years.

Any theoretical damages claims are moot as well. First, no real damages claim has been pled here. This Court will search the prolix complaint, amended complaint, and supplemental complaint in vain for a well-pled

allegation in compliance with Fed. R. Civ. P. 8 that any of the Respondents caused harm for which damages are recoverable. *See generally Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149, 152 (1984). *See also Newman v. Commonwealth of Massachusetts*, 115 F.R.D. 341, 344 (D. Mass. 1987) (dismissing "argumentative, prolix and verbose" complaint). The pleadings make only token requests for compensatory damages, and only as to some of the Appellees. (Implicit in this silence is recognition that the defendants are immune. *See infra* Section D.) Consonant with this view of the matter, in their Petition for Certiorari and First Circuit brief, the Petitioners have effectively *conceded* that their pleadings do *not* presently state a claim for damages. (Pet. for Cert. at 18-22; Pet. First Cir. br. at 42-44)[4]

Second, the thrust of the federal claims is that the guardianship proceedings in the Massachusetts courts were irregular due to various alleged actions and conflicts of the Respondents. The Petitioners had the right to assert such arguments in the Massachusetts courts and presumably raised all points there that they considered important. Those courts rejected the Petitioners' contentions and resolved all issues against the Petitioners. *Pollard*, 54 Mass. App. Ct. 318. Those proceedings and

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[4] What would a damages claim possibly look like here? Would it be that, but for the actions of some of the Appellees, the plaintiffs would have been Pollard's guardians and would have caused the transfer of her estate to themselves, that there would have been no effective objection to this, that the transfer would have been approved by the Probate Court, and that, therefore, the federal courts should now overlook the contrary Probate and Appeals Court decrees and award the plaintiffs the value of Pollard's estate? Mootness may be the *least* of the problems with this absurd theory.

decisions were presumptively correct and regular. *See Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 431 (1982); *Bettencourt v. Board of Reg. in Medicine*, 904 F.2d 772, 776 (1st Cir. 1990). In this context, any claims premised on the theory that the state proceedings somehow were compromised have been effectively mooted, and should not be subject to review. *E.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000); *Mills v. Green*, 159 U.S. 651, 653 (1895).

B. The District Court Properly Abstained.

In any event, the District Court properly abstained. Federal abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) is appropriate in accordance with principles of comity and federalism where necessary to avoid interference by federal courts in state judicial proceedings. *Id.* at 43-49. *See also Middlesex Ethics Comm.*, 457 U.S. at 432; *Juidice v. Vail*, 430 U.S. 327, 335 (1977). Under the *Younger* abstention doctrine, federal courts should abstain where the state proceedings: (1) are judicial in nature; (2) vindicate important state interests; and (3) provide litigants an adequate opportunity to raise federal constitutional challenges. *Younger*, 401 U.S. at 44-46; *Brooks v. New Hampshire Supreme Court*, 80 F.3d 633, 638 (1st Cir. 1996). The District Court correctly abstained here. First, the state guardianship proceedings and judgment unquestionably are judicial in nature. And those proceedings were "ongoing" at all relevant times for *Younger* purposes, because the dispositive date as to "ongoing" status is either the date on which the federal complaint was filed, or on which "proceedings of substance" took place in the federal court. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975); *Bettencourt*, 904 F.2d at 777.

The probate petition was pending when this federal action began, and at the time of proceedings of substance.

Second, the Massachusetts proceedings implicated and advanced important state interests. Massachusetts has a comprehensive statutory scheme for addressing probate and guardianship-related issues (*see* G.L. c. 201 § 1 et seq.), and a strong interest in applying its own probate law without interference from the federal courts. *See Hemon v. Office of Public Guardian*, 878 F.2d 13, 15 (1st Cir. 1989). By contrast, federal courts have limited authority to adjudicate probate matters. *Marshall v. Marshall*, 126 S. Ct. 1735, 1744-1750 (2006).

Third, the Massachusetts courts had the power to assess any constitutional issues raised by the Petitioners. *E.g.*, *Blixt v. Blixt*, 385 Mass. 555 (2002) (Probate Court has authority to decide constitutional questions); *In the Matter of Moe*, 385 Mass. 555, 561 (1982) (Probate Court is a court of "superior and general jurisdiction possessing inherent powers. . . ."). And the Petitioners had the opportunity to make their arguments in the Probate Court and to press them on appeal, and did so. *See Pollard*, 54 Mass. App. Ct. 318. The fact that the state courts ruled against the Petitioners is immaterial, and no reason not to abstain. *Bettencourt*, 904 F.2d at 779.

The Petitioners tacitly concede these points. They attempt to argue instead that this case involves bad faith, harassment, or . . . other unusual circumstances within the meaning of *Younger*. *See* 401 U.S. at 54. This exception to abstention has been construed "very narrowly" by this Court, and is applicable only in "unusual circumstances." *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *Perez v. Ledesma*, 401 U.S. 82, 83-85 (1971); C. Wright, A. Miller &

E. Cooper, *Federal Practice and Procedure* § 4255 (1978). No such circumstances are present here. There is no well-pled allegation of bad faith, harassment, or other unusual circumstances. There is no allegation or evidence that the Probate Court judge or the justices of the Massachusetts Appeals Court had any pecuniary interest in the guardianship petition. *Contrast Gibson v. Berryhill*, 411 U.S. 564 (1972). There is nothing here other than state court litigants who are unhappy with largely factual decisions of state courts and seek to challenge them collaterally in federal court.

Further, the Massachusetts Probate and Appeals Courts are presumed to be tribunals "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow v. Larkin*, 421 U.S. 35, 55 (1974) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). The Petitioners have not come close to overcoming this presumption. Finally, the federal oversight that the Petitioners seek would fly in the face of the principles of comity that underlie *Younger*. Comity has no practical value if litigants who disagree with interlocutory findings of fact, orders, and judgments in state proceedings can interrupt and nullify those proceedings simply by citing section 1983 and demanding supervision from a federal court.

C. Pursuant to the *Rooker-Feldman* Doctrine, the District Court Lacked Subject Matter Jurisdiction.

Even as explicated by *Exxon*, the *Rooker-Feldman* doctrine still precludes precisely the kind of federal regulation of state court proceedings and orders that the Petitioners seek here. *Rooker-Feldman* holds that federal

courts lack subject matter jurisdiction over claims that seek review of state court judgments. *See generally Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-416 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-486 (1983). According to the *Exxon* Court:

> The *Rooker-Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

Exxon, 544 U.S. at 284. "Under the *Rooker-Feldman* doctrine, federal district courts lack jurisdiction over federal complaints . . . [that] essentially invite federal courts of first instance to review and reverse unfavorable state-court judgments." *State Resources Corp. v. The Architectural Team, Inc.*, 433 F.3d 73, 79 (1st Cir. 2005) (quoting *Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R.*, 410 F.3d 17, 20 (1st Cir. 2005)).

Pursuant to these authorities, the lower Courts properly denied the 60(b) motion. This case fits the paradigm *Rooker-Feldman* pattern as described in *Exxon*: The federal action and 60(b) motion were brought by state court losers complaining of alleged harm caused by *prior* state court proceedings, orders, and a judgment; and the state court losers seek federal review and rejection of these prior orders and judgment. As the federal suit seeks nothing less than review and revamping of final decisions of the Probate Court and the Massachusetts Appeals

Court, *Rooker-Feldman* still applies, and there is no federal jurisdiction.

The fact that the Petitioners filed their first complaint just before the Probate Court proceedings had fully concluded does not alter this conclusion, as this chronology illustrates:

- The federal amended complaint was filed three weeks *after* the Probate Court trial. It extensively criticizes the Probate Court's conduct of the prior trial and the Court's trial rulings, and seeks relief on the basis of the Probate Court's alleged errors.
- The Probate Court issued its decision dismissing the guardianship petition on June 25, 1999, effectively concluding the Probate Court's review of the Petitioners' complaints – constitutional and otherwise.
- *Thereafter*, in September 1999, the Petitioners purported to file their "Supplemental Complaint," which specifically criticized the Probate Court's June judgment, and sought a declaration that the June judgment was actionable under 42 U.S.C. § 1983 due to the "apparent criminal conduct, fraud, deception and/or mistake through/upon [sic] the conduct of some or all of the . . . Defendants." (Supp. Comp. ¶ 37).[5]
- After the Probate Court's decision and the filing of the Supplemental Complaint, the District Court issued its memorandum and order of dismissal in December 1999.

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[5] The District Court relied on and cited the Supplemental Complaint in its Memorandum and Order of dismissal. (App. 2a)

- In 2002, the Massachusetts Appeals Court affirmed the judgment of the Probate Court and the Supreme Judicial Court denied review. *Pollard*, 54 Mass. App. Ct. 318.
- In 2005, the Petitioners moved pursuant to Rule 60(b), openly seeking *current* federal review and nullification of the long-final Probate Court judgment.

Given this history, *Rooker-Feldman* applies in either of two ways.

First, this case fits the scenario anticipated in *Federacion de Maestros*, in which federal review is sought while the state proceedings are ongoing, but have ended as to the disputed federal issue. *See* 410 F.3d at 27 n.14. That is this case. The Petitioners were unhappy with rulings by the Probate Court, and by the Probate Court's dismissal of their guardianship petition. They filed the federal suit purporting to allege due process-type violations in three pleadings that attacked virtually all aspects of the probate proceedings, including the trial and judgment. The Probate Court proceedings the Petitioners were aggrieved by *ended* with that Court's June 25, 1999 decision, which then was *followed* by the filing of the supplemental complaint, the District Court's consideration of the motions to dismiss, and the District Court's dismissal of the federal suit. As the Probate Court proceedings that were the subject of the Petitioners' complaints had, "for all practical purposes, ended as to the federal issue" *before* federal review occurred (*Federacion de Maestros*, 410 F.3d at 27 n.14), *Rooker-Feldman* still fits.

Second, in any event, the Petitioners' 60(b) motion seeks *in 2006* a federal review of state proceedings that

have been *fully* complete and final since all state appellate review ended *in 2002*. Regardless how the chronology of the state and federal matters in 1999 and 2000 may be parsed, the Petitioners are *now* seeking to nullify a state judgment that was affirmed in 2002 simply because they disagree with the decision and dislike its effect on them. *Rooker-Feldman* would not permit this if the Petitioners were commencing their federal suit now. *See Johnson v. DeGrandy*, 512 U.S. 997, 1005-1006 (1994); *Howlett v. Rose*, 496 U.S. 356, 369-370 n.16 (1990); E. Chemerinsky, *Federal Jurisdiction*, 423 (2d ed. 1994). They should not be permitted to make an end run around this restriction because, through a fortuity of timing, they are acting through a 60(b) motion rather than a new complaint.[6]

D. The Doctrine Of Judicial And Quasi-Judicial Immunity Also Bars The Petitioners' Claims.

Even if there were no reason to abstain and good subject matter jurisdiction, the Petitioners' claims were properly dismissed based on the doctrine of absolute judicial and quasi-judicial immunity. Judges are absolutely immune from civil liability for any judicial act. *See Cleavinger v. Saxner*, 474 U.S. 193, 199-200 (1985); *Forrester v. White*, 484 U.S. 219, 225 (1988); *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). Beyond judges, absolute immunity has been extended to a variety of persons performing quasi-judicial functions, including clerks, registers, and

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[6] Nor can the Petitioners trump the issue by alleging diversity jurisdiction. There can be no diversity jurisdiction here, as state actors in their official capacities are not "citizens" of any state. *See Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299-300 (1937).

court-appointees. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Briscoe v. LaHue*, 460 U.S. 325, 335-336 (1983); *Butz v. Economou*, 438 U.S. 478, 513 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 424-427 (1976).

These principles required dismissal of all claims against Perlman (court-appointed guardian *ad litem* and, later, judge), Shirazi (court-appointed physician), Sacks and Dunphy (judges), Carroll (assistant register of probate), and all other Respondents to the extent they were appointed by or assisting the Court, or otherwise acted in judicial capacities. All such actors are immune.

CONCLUSION

For all of the foregoing reasons, the Respondents request that the Petition for Certiorari be denied.

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Dated: June 6, 2007.

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(3)

No. 06-1464

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL J. O'CALLAGHAN, *Pro Se*,
and
ALISON E. CLAPP O'CALLAGHAN, *Pro Se*,

Petitioners,

v.

HOMAYOUN SHIRAZI, M.D.; *et al*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

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PETITIONERS REPLY BRIEF

Petitioners address certain new points including Respondents' misstatements of fact and/ or law. Respectfully, in context of the Federal jurisdiction subject addressed concerning Petitioners' Federal pleadings, it appears appropriate that pleading excerpts herein be included.

In context of the facts and circumstances known to Petitioners upon Federal case commencement, *i.e.*, the absence of knowledge that Hortense's will already had been changed by BR&G, Corash, *et al.*, it was not appropriate for Petitioners to identify an *ad damnum* amount upon a premature "will contest". However, both Federal question jurisdiction and diversity jurisdiction were asserted by Petitioners in all filed Federal pleadings and all contended damages to be determined at trial by a jury. Petitioners address new points.

- "*Pollard objected to the Petition ...*" In reality, BR&G and Corash falsely represented authority as Hortense's "counsel". Astonishingly, not a single piece of paper was submitted by these attorneys – or anyone else -- which established such attorney-client relationship. More, not at any time -- and notwithstanding Petitioners' several requests -- did any State authority require submission of such "proof" of attorney authority on behalf of Hortense.

  Not at any time or under any circumstance did Hortense ever appear in public or in court and not at any time did Hortense submit any writing in any proceeding in which Hortense evidenced retention of BR&G and/or Corash as "counsel" or evidence that Hortense was knowledgeable concerning the proceedings or objected to the guardianship petition(s).[1]

---

[1] Respondents' effort to posit a "distant" relationship is belied by the actual facts: Co-Petitioner and sister (heirs) were raised in Springfield, Mass., where their father, Harrison Clapp, a Springfield

- Petitioners were not present at the April 9, 1998, proceeding and were not knowledgeable relating to the events of this proceeding nor provided consent to any event other than an order for temporary guardianship.

- At the June 1, 1999, trial, as there remained imposed legal impossibility for Petitioners to establish "incompetency", Petitioners sought a statutorily assured medical examination, *e.g.*, by Dr. Fleitman and Dr. K, so as to satisfy the *Medical Certificate Statute*. Judge Perlman testified as a witness pursuant to Judge Sacks' instructions. Judge Perlman's testimony was not "...adverse to the Petitioners' position" – other than as solicited by Judge Sacks, not the Petitioners -- nor did Petitioners "rest" their "case". *See infra.*

---

native/Amherst College graduate, was the Secretary of the Massachusetts Mutual Life Insurance Company. The sisters graduated from Mount Holyoke College and Smith College and maintained a lifelong loving relationship with Hortense.

Hortense was the 2nd daughter of Alvin Clapp, the brother of Arthur Clapp, Co-Petitioner's grandfather, who was a graduate of Amherst College and Harvard Medical School.

Upon Arthur Clapp's untimely death, Alvin Clapp helped raise the then 5-year old Harrison Clapp. The Clapp families remained close, particularly in the Northampton home which Alvin had built in/ about 1896 – which Hortense maintained for the Clapp family.

Hortense resided in this home her entire life, including for many years with her older sister, who married Ralph Pollard. Through Hortense's 60th year, Hortense remained unmarried. Then, subsequent to her sister's death, Hortense at age 61 married Ralph Pollard who had remained in the Clapp home. Several years subsequent to Ralph Pollard's death, Schroder/ Brandt and Rev. Ives/ First Churches began their campaign for control of Hortense and her assets. The Respondents' insistence for "*Pollard*" is misrepresentative of the Clapp families' continuity in Northampton.

- The district court did not hold a "hearing" on 5.27.99, rather, *oral argument*. Petitioners' statement that no "*Rooker-Feldman*" bar then existed – which appears undisputed -- is misrepresented by Respondents. *See infra*. More, the district court's reluctance to address the clear absence of due process in State proceedings and urgency for R. 15 medical examination prevented any just remedy. Instead, regrettably, this promoted the State's disinterest in legitimate proceedings in a dispute in which local attorneys had acted in violation of our Constitution.

- Respectfully, there does not exist "*unfair prejudice*". The individual Respondents remain in the local community and remain available to address their conduct before a jury.

- "*Void judgment*" remains meritorious. *See infra*.

- Real damages have been plead. All 3 Federal pleadings alleged facts in support of *fraud* and *undue influence*, *i.e.*, grounds for will contest concerning a will which Petitioners remained unaware for years had been changed.

- Notably, upon years of review, none of the Respondents -- even here or any State court -- ever has written/ mentioned "*Dr. Zesiger*" evidence or the *Medical Certificate Statute*. Why do all Respondents avoid this? This is neither fair nor credible. "*Abstention*" lacks merit.

I. Federal Pleadings/ Proceedings Support Grant of Writ

The Complaint dated 4.29.99 alleges in part:

¶...[Petitioners...2/4/99 Probate certification]:

(v)..direction for ...medical examination by..Dr. K], ..., in accordance...*Medical Certificate Statute*,

(vi)..tape recordings ..evidenced..denial of due process/equal protection.. right of access to courts...:

[6/29/98 proceedings]

(ii) Judge Wilson … suggestion that Hortense "change her will" so that Petitioners .. pay BR&G's counsel fees – notwithstanding substantial evidence of pervasive undue influence, fraud, and isolation of Hortense by Schroder, Rev. Ives, BR&G, Corash …others;

(iv) Judge Wilson proposes that Judge Perlman hear the case as "Judge Perlman" as well as participate as … [*GAL*]; …

(viii)…[BR&G]'s insistence…Rev. Ives'… as "overseer", *i.e.*, *de facto* guardian;…

(x) … throughout this "hearing" there is frequent laughter…at Petitioners' expense;…an absence of mention of Schroder's 6-month campaign to obtain...$85,000 gift/ loan…;

[10/2/98 proceedings]

(iv)…Judge Dunphy stated that Judge Perlman "could not be a part of a trial"; Petitioners'… request that the case be transferred to Boston, …, for re-assignment to a fair and impartial judge…unmentioned, as well unmentioned … alternative request …remain at Northampton …."visiting judge" … unacquainted…

¶… March 8, 1999,..[Petitioners] sought relief..grounded..bias:

(vii) … trial "bifurcation" limited to "competence" establishes …prejudice – *i.e.*, absent…timely satisfaction of…*Medical Certificate Statute*, …[Petitioners] …not have any ability to have…"day-in-court" upon…sole issue…"trial", *viz.*, "competence"; ….

(x) Judge Sacks'...denial of right of access...upon ... non-implementation of...*Medical Certificate Statute*.. denial of ...[Dr. K's] examination..

¶ Pursuant to notices ...[Petitioners] sought to take ...depositions of...First Ass't, Judge Perlman .. ..[O]rder dated March 16, 1999 ...prejudicially directed (i) trial ... June 1, 1999, solely upon ... "bifurcated" issue of "competency", (ii) Judge Perlman's trial attendance ..., and directed trial testimony upon "competency", (iii) ...preclusion of all witnesses to...[Petitioners],...excepting Dr. Fleitman, notwithstanding that Dr. Fleitman's "Medical Certificate(s)" as of June 1, 1999, will be in excess of 14 months old, *i.e.*, statutorily inadmissible to support... Petition,...and (iv) authorizing the testimony of "Dr. Shirazi".

¶...[O]n March 18, 1999, .. [Petitioners] filed an Amended Petition.., which seeks completion of a Medical Certificate in statutory compliance with the *Medical Certificate Statute*"; ...

¶... [Petitioners]..[on] March 27, 1999, presented objection..:

(i) Dr. Zesiger's first examination of Hortense on April 6, 1998, i.e., ...3.. days prior to the "unrecorded" April 9, 1998 Hearing at which Rev. Ives, First Churches, Corash and BR&G... appeared absent any written evidence or papers in opposition, contending Hortense's "competence", demanding appointment of a ... [GAL] and further medical evaluation, ...;

(iii) Dr. Zesiger's concluding 12/11/98 examination at which mentation observed as "markedly decreased memory" ..., nonetheless, further reevaluation/ revisit not scheduled for six (6) months – *i.e.*, subsequent to Judge Sacks' ordered June 1-3, 1999, trial; ...

(v) Dr. Zesiger's ...letter dated March 4, 1999, to BR&G ... inquiry, in which... Dr. Zesiger certifies that Hortense requires ... [24] hour a day care, ...[7] days a week ... very

high risk of grave bodily harm … from falls, otherwise, certainly in a nursing home.

Transcript: District Court, 5.27.99:

Court ..[W]e can't decide whether or not they've had a fair hearing until we've seen how the entire state judicial system works in dealing with the case.

Petitioner My difficulty is – will come about… To have a *Rooker-Feldman* bar placed in the case through the adjudication at a trial determining competency because there's an inability to demonstrate incompetency, absent a medical certificate within 30 days of the decree [*i.e.*], a medical examination leading to a medical certificate within 30 days of a decree, a petitioner is unable to establish incompetency. I have been denied that …--…

Court ..[E]ven assuming that I have the power.., I can't make that determination until I've seen how the state judiciary actually treats this, what happens on appeal.

Petitioner My concern – you wouldn't have any jurisdiction, judge …

My concern is you might well not have jurisdiction. *Rooker-Feldman* is a bar --

Court That may or may not be the case, but this much is clear: that there can be no fair evaluation of what's transpired in the state courts without a resolution of the appellate rights. …

Amended Complaint dated 6.23.99:

¶ ..[T]ape ..evidences …[initial] hearing on April 9, 1998 …:

…

(e) BR&G ... did not address Dr. Zesiger's examination ... which had occurred ... 3 ... days earlier ... -- ...must have been known to BR&G, Rev. Ives/ First Churches/ Corash and Schroder;

(f) rather, BR&G ... alleged that Hortense had lost confidence ...in... Bowen [after 40 years] ... that Hortense had sought Rev. Ives ... Corash ... to replace Bowen, ... and that Rev. Ives wanted to be ... financial manager ... that a bookkeeper ... retained by Corash ..., and that Rev. Ives sought to oversee visitation by ... "VNA" ...;

(g) Dr. Zesiger's ... April 6, 1998, ... report of ... declining ... capacities ..., remained unmentioned, rather, ... Corash contened ... Hortense ... fine ...;

(h) BR&G ... contended ... temporary conservator... that Hortense wanted Rev. Ives ...BR&G ... sought ... prompt production of Hortense's will ....;

(i) Hortense did not appear ... not occur any request ... (i) Hortense be in attendance, ... (ii)...Dr. Fleitman complete the March 31, 1998, examination which Schroder had precluded ...7 ... days subsequent to BR&G's ... represented March 25, 1998, retention as counsel for Hortense – retained "through" Corash; ...

(k) ...BR&G .. requested an additional investigation by mental health evaluator with BR&G's input -...; ...

¶ Upon such identified First Ass't's and BR&G's ... improper conduct, ... thereby Rev. Ives/ First Churches, Corash, Schroder and BR&G ... were enabled (i) to prejudice ... [Petitioners] in the guardianship proceeding and (ii) to prejudice ... [Petitioners'] constitutionally protected rights to jury trial upon fraud and undue influence concerning identified subsequent legal proceedings....

¶ ...[The 6/1/99] trial,...[The Proposal];...

¶ ... [A]t .. 5:00 p.m., .. Judge Sacks in great haste had left the Bench notwithstanding that...enforcement of.. trial subpoenas

upon Hortense and.."Dr. Shirazi" remained undecided and that ... [Petitioners] had not rested ...case, including the testimony of Dr. Fleitman and...[his] examination of Hortense during the period June 2-3, 1999, so as to provide compliance with the *Medical Certificate Statute*. ....

¶ [T]here have occurred violations of..[Petitioners'] due process/ equal protection ...and right of access to courts...: ...

(ii) through bifurcation there occurred facilitation of ...non-production of evidence ... relating to bias, impropriety by judicial officials and others, conflicts of interest, favoritism...misrepresentation, and...issues relating to undue influence and fraud, by/ between/ among the ... [Respondents] in the small Northampton community – especially legal community; ...

Petitioners' Motion to Circuit Court 2.14.2000

Rooker-Feldman: Not a Bar to Claims

...[Petitioners] promptly sought *vacatur ab initio* of the [Probate Court] *Decree of Dismissal* grounded upon bias and bad faith. Thus, substantively, ...[Petitioners] assert absence of *Rooker* preclusion grounded upon "**void judgment**" as recently as ... [Petitioners'] memorandum to the district court [9.20.99] ... [Petitioners] addressed the "void judgment" exception ...[citing] *Fielder v. Credit Acceptance Corporation*, 10 F. Supp.2nd 1101, at 1104 (W.D. Mo. 1998) ("*federal court may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake*"). [Citations omitted.]

II. Petitioners' Supplemental Complaint Meritorious: Real Damages Alleged

Leave to file a supplemental pleading is granted, absent prejudice. *See Quarantino v. Tiffany & Co*., 71 F. 3rd 58, 66 (2nd Cir. 1995); *see also, Keith v. Volpe*, 858 F. 2nd 467,

473-74 (9th Cir. 1988) (R. 15 (d) use "*favored*", not require "*same transaction*" but "*some relationship*"); *Weeks v. New York*, 273 F. 3rd 76, 88 (2nd Cir. 2001) ("*[t]he threshold consideration ... is whether the supplemental facts connect [the supplemental pleadings] to the original pleadings*"). Motion for supplemental pleading is considered upon same factors as motion to amend pleading under R. 15 (a). *Klos v. Haskell*, 835 F. Supp. 710, 715 (W.D.N.Y. 1993), *aff'd* 48 F. 3rd 81 (2nd Cir. 1995) (R. 15 (a) and (d) share same standard).

If necessary, there should be authorized amendment to the *Supplemental Complaint* so as to include a jurisdictional *ad damnum* amount upon alleged diversity jurisdiction. *See Doyle v. Household Credit Servs., Inc.*, 844 F. Supp. 13 (D. Me. 1994).[2] *Relation back* should be permitted to the date of *Complaint* filing, *i.e.*, April 29, 1999, grounded upon R. 15 (c) and R. 15 (d). The claim(s) for wrongful pre-positioned inheritance was implicit in the injury identified in the earlier pleadings, *e.g.*, absence of medical examination unfairly provided (secreted) opportunity for the individual Respondents within days to change the at least 20-year will to/ for their own financial and other benefit. This injury to Petitioners "*arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading ...*"[3] This standard is measured by the facts pleaded.

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[2] *Doyle* quotes Wright & Miller § 1213. *Jurisdictional Amount*: "*If the allegations of the complaint clearly show the requisite jurisdictional amount to be in controversy even though no express allegation of jurisdictional amount is made, dismissal of the complaint for failure to allege subject matter jurisdiction would be unwarranted inasmuch as an amendment to correct the deficiency can be made easily and expeditiously*".

[3] *See Alpern v. UtiliCorp United, Inc.*, 84 F. 3rd 1525, 1543 (8th Cir. 1996) ("*The basic inquiry is whether the amended complaint is related to the general fact situation alleged in the original pleading*"); *Wilson v. Fairchild Republic Co.*, 143 F. 3rd 733, 738 (2nd Cir. 1998) ("*The pertinent inquiry ... is whether the original complaint gave the defendant fair notice of the newly alleged*

Allowance for *relation back* does not depend on the legal theory originally presented. *Johnson v. Crown Enterprises, Inc.*, 398 F. 3rd 339, 342 (5th Cir. 2005) (focus not on caption of claim, but on underlying facts); *Maegdlin v. International Association of Machinists and Aerospace Workers*, 309 F. 3rd 1051, 1053 (8th Cir. 2002) (new legal theory supported by identified original facts).

Here the district court's stay of all discovery on August 24, 1999, prejudicially precluded to Petitioners any ability to obtain timely evidence not only of Hortense's medical condition but also the individual Respondents' motives, conduct and secreted year-earlier purported change of will. "*Relation back*" serves the interests of justice and promotes remedy to such district court unfair and consequential stay of discovery – then, *Rooker-Feldman* dismissal with *$10,000 bond* and "*appeal appearing frivolous*" enduring prejudice. Indeed, at every meaningful occasion the State revived such wrongful and prejudicial "*Rooker-Feldman*" bar, "*appeal appearing frivolous*" and *$10,000 bond* impositions.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
June 18, 2007

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claims"). *See Mayle v. Felix*,__ U.S. __, 125 S. Ct. 2562, 2569-75 (2005) which supports such remedy to Petitioners.